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In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

NORTHERN OIL COMPANY, INC.,
BRAY OIL COMPANY, INC.,
NORTHERN TERMINALS, INC., AND DANA S. BRAY
Petitioners

v.

STANDARD OIL COMPANY OF CALIFORNIA
AND CHEVRON U.S.A. INC.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the TECA's ruling that a cause of action for overcharges accrues at the time of the original misclassification and not at the time of contract is contrary to public policy embodied in the Economic Stabilization Act.

2. Whether a release is void as against public policy where such release was obtained by deceptive practices and economic coercion in circumvention of the Emergency Petroleum Allocation Act and supporting regulations.

3. Whether the purported federal common law principle that "a misrepresentation made during business negotiations does not constitute an actionable fraud claim if the deceived party had access to the underlying truth" is consistent with the controlling case of Shappirio v. Goldberg, 192 U.S. 232 (1904).

4. Whether Congressional intent, public policy and the decisions of this Court, permit the rejection of Vermont law as the federal common law of fraud applicable to a release of federal statutory claims.

5. Whether the Erie doctrine allows the TECA to apply federal common law to a release of federal statutory claims.

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IN THE

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OCTOBER TERM, 1984

NORTHERN OIL COMPANY, INC.,
BRAY OIL COMPANY, INC.,
NORTHERN TERMINALS, INC., and
DANA S. BRAY

PETITIONERS

V

STANDARD OIL COMPANY OF CALIFORNIA,
and CHEVRON U.S.A., INC.

OP NIONS BELOW

The Opinion of the Emergency Court of Appeals (App. 1-22) is unreported to date. The opinions of the district court (App. 23-187) are unreported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals (App. 1) was entered on March 26, 1985 and a petition for rehearing

and suggestion for rehearing En Banc was denied on April 24, 1985 (App. 22). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL STATUTES AND REGULATIONS INVOLVED

Economic Stabilization Act, §210(a),(b),(c)
12 U.S.C. §1904 note (1980 Supp.)

Emergency Petroleum Allocation Act
15 U.S.C. §753(b),(1),(2)

Freedom of Information Act
5 U.S.C.S. §552(b)(7)

Price Rule (Refiners)
10 C.F.R. §212.83(a),(1),(2),(3)

Violations
10 C.F.R. §205.202

Normal Business Practices
10 C.F.R. §210.62(c)

Production or Disclosure Prohibited
10 C.F.R. §202.22

Confidential Information
10 C.F.R. §205.201(e)

STATEMENT

1. Background

For 25 years before the enactment of the Economic Stabilization Act (ESA) in 1970, Bray companies (petitioners) were branded wholesale distributors of Chevron's products. These products were marketed by Bray companies in up-state New York and throughout Vermont. The heating oil (middle distillates) supply contracts historically required Chevron to bear all transportation costs. Bray companies were also granted discounts off the prices posted at Albany, New York and Burlington, Vermont. Middle distillates were transported from Chevron's New Jersey plant to Bray's terminals by barge. Because the waterways freeze in winter months, all deliveries were required to be made by November 15.

When ESA was enacted in 1970, the parties were operating under contracts entered into in 1968, which were due to expire on May 31, 1973.

In 1972, the Bray companies were Chevron's largest wholesale distributors of middle distillates in the northeast and one of its largest gasoline distributors. The price of heating oils was frozen in 1972, but Chevron decided it wanted more profits from the Bray contracts. Consequently, Chevron gave written notice to Dana Bray that unless Bray companies agreed to buy product at the New York harbor price, supply of all products would terminate. Chevron was well aware Bray companies had no other source of supply due to the critical nationwide shortage of petroleum products.

Bray companies resisted Chevron's "proposal" because it substantially increased the price of fuel oil by shifting transportation costs and eliminating customary discounts. May 31 came and went without any new contracts. Finally, on July 11, 1973, Mr. Pfefferkorn of Chevron unexpectedly flew to Burlington and insisted that predrafted contracts be signed or all shipments of product would immediately cease. Chevron knew that the Cost of Living Council was preparing to fix a freeze date of either May 15 or June 13, 1973: Bray companies were totally unaware of this.

The July, 1973 contracts contained a retroactive starting date "as of May 1, 1973". Dana Bray pointed out that the prior contract had not expired until May 31, 1973, and asked for an explanation. Mr. Pfefferkorn said this date was selected so that all customer contracts would commence on May 1.

This statement was false and Bray companies relied upon it in signing the new contracts. (App. 134-136) Bray companies did not discover the truth until 1978.

The price regulations in effect at all relevant times required Chevron to classify its customers on the basis of volume, location, method of delivery and terms of sale. Chevron knew these criteria established Bray companies were in a class by themselves. To circumvent these regulations, Chevron placed Bray in its so-called New York Harbor Barge buyer class.

The mandatory provisions of the Emergency Petroleum Allocation Act (EPAA) were in effect when the 1974 supply contracts were signed. The only major difference between the 1973 and 1974 contracts was a change in credit terms. This change removed Bray companies from consignment and required payment for product on a fixed time schedule.

In October, 1974, the Federal Energy Administration (FEA) learned of this credit change and issued to Chevron a Notice of Probable Violation (NOPV). (App. 208-210). The FEA did not furnish a copy of its NOPV to Bray Oil. Bray companies were not parties to this proceeding, but became aware of it when the FEA requested price and credit information concerning the 1973 and 1974 supply contracts. The FEA also advised Bray companies to resume payment on a consignment basis. Chevron did nothing about Bray companies' return to consignment until June of 1975 when Chevron learned the NOPV was to be rescinded by the FEA on "technical grounds".

Chevron then notified Dana Bray it would not supply product except on a cash before delivery (C.B.D.) basis and that it would not restore Bray companies to consignment unless it was given a general release.

Chevron's attorney, Matthew Fitzgibbon, then informed Attorney O'Brien, who represented Bray companies, that the FEA "might take until July 15 to come up with the decision".

On June 30, 1975, Attorney Fitzgibbon, along with Chevron employees Kaiser, Pfefferkorn and Martin, held a telephone conference with William Costello of the FEA. Costello informed Chevron that he had recommended rescission of the NOPV because the NOPV contained the "incorrect base period" as it was presently worded. Mr. Costello refused to give Chevron a "clean bill of health" despite Chevron's request, Chevron warning the FEA that the agency would have a bigger problem this fall and winter because of the "effects on third parties".

Chevron, on July 10, 1975, demanded a general release as a condition to entering a new supply contract. Five days later,

Chevron sent a letter which once more demanded a release and went on to state:

> Although we continue to be advised by FEA that the matter is being brought to a conclusion, we still have received no formal advice as previously mentioned to Mr. O'Brien and to you.

pies of this letter were sent to State New York and Vermont Energy offices, and to the FEA offices in Boston and New York.

On July 28, 1975, Chevron received the FEA's formal written notice of rescission of the NOPV. (App. 211) This letter stated the rescission was "not dispositive of the credit terms in effect on May 15, 1973". The next day, Mr. Pfefferkorn called Mr. Costello of the FEA to discuss the meaning of the rescission letter. Mr. Pfefferkorn learned the words "not dispositive" meant "not the final word as to what credit terms actually were" and that (1) it was the FEA's opinion no contract existed as of May 1, 1973;

and that (2) "FEA feels May 15, 1973 price still before them" and (3) the FEA would continue the investigation as soon as that agency had manpower available.

Chevron waited until August 28, 1975 to inform Bray companies by letter that the NOPV had been "formally rescinded". This letter contained nothing which had not already been said in the July 15th letter except the following passage:

> We believe you are familiar with the FEA's NOPV of October 25, 1974 directed to Chevron but you may not be aware that FEA has formally rescinded their NOPV of that date. With the past-due account in the amount of $3,500,000.00 and also lack of current financial information, we regret to advise you that we cannot supply you with middle distillate products on extended credit terms unless your account is brought to a current status and unless we can satisfy ourselves on the future credit reliability of your company.

Chevron did not send copies of this letter to the FEA as it had done with previous letters; nor was a copy of the FEA's

rescission letter sent to Bray companies. A copy of this letter was, however, sent to the state energy offices in Vermont and New York.

Mr. Pfefferkorn called Dana Bray shortly after August 28th to tell him the "FEA had found us innocent of any wrongdoing in the handling of your account" and that the "FEA had found Chevron innocent of any wrongdoing in the '73-'74-'75 contracts".

State energy officials of Vermont and New York, faced with a critical shortage of heating oils because of Chevron's threat to terminate supply to its sole distributor, directed that a meeting be held between Chevron and Bray companies in Albany, New York on September 17, 1975. The states invited FEA officials to attend the meeting. FEA officials present were Mr. Levine and Mr. Webster, both of whom made it clear from the outset they were there only as observers.

Neither Mr. Bray nor Attorney O'Brien had ever met Webster prior to this meeting. William Costello was not in attendance. The clear purpose of the meeting was to provide a continued supply of product to up-state New York and Vermont. There was no discussion about the NOPV or the "rescission".

At that meeting, Chevron again stated it would only furnish product on a C.B.D. basis until the alleged past dues were paid and general release signed by Bray companies. Believing the FEA had exonerated Chevron, and realizing his business could not survive, Dana Bray offered to turn his terminals over to Chevron and let it supply his customers because he didn't have the financial ability to do so under the circumstances. Dana Bray made this offer "because my concern was for my people in the area getting the oil". Chevron refused to even consider it. Chevron's

only concern was getting the money allegedly owing because of the change in credit terms.

The parties met in Burlington on October 1st and 2nd to discuss possible supply contracts. Because Mr. Bray was unwilling to sign a release, an impasse developed. At this point, Attorney O'Brien held a private meeting with Dana Bray, lasting about two hours. The topic of the meeting was the release. Attorney O'Brien advised Mr. Bray that he could not give him "a sufficient basis for an opinion" that litigation or administrative action would be successful or timely. Dana Bray concluded "we already lost before the FEA ... look how long that took before and we ended up the way we did".

Dana Bray decided "he had no choice and there was no alternative available to him except to sign the release in order to get the product up and available for the oncoming season". Mr. Bray signed the

release.

The release was later given to the FEA by SOCAL officials when an investigator for the FEA presented a request for information on the pricing matters to SOCAL's San Francisco office. The investigation had, of course, continued although it was transferred shortly after the notice of rescission from Region I, Boston to Region II, New York and then to Region IX, California. The FEA accepted this release as a final resolution of the issues, and terminated its investigation.

After Mr. Bray "agreed" to sign the release, Chevron and Bray companies entered into another one-year heating oil and gasoline contract containing the same illegal prices as the prior contracts. Heating oil was supplied until March 31, 1976 and gasoline until August 1, 1976. By that time, Bray companies were virtually bankrupt. They

ceased all operations. Chevron sued in state court to recover amounts allegedly due on a 1975 promissory note executed in conjunction with the release, and for deliveries of gasoline and heating oil made pursuant to the post-release 1975 supply contracts. During discovery proceedings in state court, Bray discovered Chevron's 1973 and 1975 fraud and immediately instituted an action in federal court.

2. Court proceedings

The state court action was stayed when Bray companies filed a complaint in the United States District Court for the District of Vermont on October 6, 1978.

The complaint charged Chevron and its parent company, Standard Oil Company of California with violations of federal regulations issued under the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. §751 et. seq. and common law fraud and duress. The

federal district court took exclusive jurisdiction on the basis of §211(a) of the Economic Stabilization Act (ESA) of 1970, and pendent jurisdiction over the state claims of fraud and duress. Bray companies sought damages recoverable under §210(a) and (b) of the ESA including reimbursement for fraudulent overcharges for the contract years, 1973-1974, 1974-1975, 1975-1976, treble damages for intentional overcharges and attorneys' fees. On the common law fraud and duress claims, consequential damages for the loss of business entities were sought in the alleged sum of Forty Million dollars. Chevron counterclaimed for collection of a debt alleged to be due on a 1975 promissory note and for deliveries of gasoline and heating oil made pursuant to the post-release 1975 contract.

The first half of the bifurcated trial by jury - on the liability issues only - began

on July 21, 1982. The trial lasted almost seven months. After two weeks of deliberations, the jury returned eleven special verdicts consisting of 57 responses to corresponding interrogatories. (App.131 - 143)

In his July 27, 1983 Decision, the district judge resolved the legal effect of the special verdicts. He ruled that Special Verdict 5 established Chevron's fraud in the inducement of the 1973 supply contract. (App. 134)

In his October, 1983 Decision, the district judge responded to Chevron's motion to set aside the jury determination of fraud in the inducement of the 1975 release by a grant of Judgment Notwithstanding the Verdict. The district judge granted J.N.O.V. on the basis of federal common law, rejecting the Vermont fraud law he charged to the jury. (App. 70-88)

The district judge also ruled that the 1975 release did not absolve Chevron from perpetuating the 1973 fraud and intentionally overcharging Bray companies in the post-release, 1975 supply contract. (App. 23-28)

The jury's Special Verdict 6 also revealed Chevron placed economic pressures upon Mr. Bray which forced him to sign the 1973 supply contract because he had no reasonable alternative. Special Verdict 11 established Chevron had misclassified and overcharged Bray from all relevant heating oil supply contracts. Verdict 3 established Chevron's infliction of duress in obtaining the 1975 release.[1] (App. 131-143)

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[1] The jury in Special Verdict 4(b) apparently found the 1975 duress had been ratified by Bray companies failing to promptly repudiate the release. This Court will please note that the instructions following 4(b) were given in error, as a party cannot ratify an unknown fraud. The jury either ignored these instructions or what is more likely, misunderstood the question and checked the wrong

The court's final judgment on April 10, 1984 awarded Bray companies $210,000.00 plus interest for overcharges arising after the 1975 release. This sum was doubled pursuant to the damage provision of §210(b) of the Economic Stabilization Act (which provides up to treble damages for intentional and wilful overcharges). Chevron was awarded over Three Million dollars, principal and interest, on its counterclaim.

Appeals were taken by both parties to the Federal Court of Appeals for the Second Circuit and to the Temporary Emergency Court of Appeals.

The Second Circuit stayed the appeals "pending a determination of appeals from the same judgment in the Temporary Emergency Court of Appeals". A judgment and mandate was entered by the TECA on March 26, 1985. The TECA decision upheld the district court's grant of J.N.O.V. on the 1975 release, and reversed the

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response. Bray companies requested the district judge to poll the jury, but he declined to do so. (App. 134)

district court's award of post-release damages.

REASONS FOR GRANTING THE PETITION

I. The TECA's Ruling That A Claim Of Overcharge Accrues At The Time Of The Original Misclassification And Not At The Time Of Contract, Is Contrary to Public Policy.

The TECA held "... a cause of action for an overcharge based on improper classification accrues at the time of the original improper classification". (App. 14-17) Consequently, the majority of the TECA viewed a claim for overcharges separate and apart from the terms of the three consecutive heating oil supply contracts. The court reasoned that since the overcharge cause of action had accrued at the time of the "as of 1973" supply contract, it was barred by the release. This finding overruled the following relevant portion of the district court's decision:

> It seems clear enough to the court that overcharges resulting from a misclassification grounded in fraud which was carried forward to the

> supply agreement 'executed on or after' October 14, 1975, were not extinguished.
>
> While the release purported to compromise any claims of fraud that attended the prior arrangements, 'as of May 1, 1973 and as of May 1, 1974', it specifically excluded the contract relating to sale and purchase of petroleum products executed on or after the date of the settlement. (App. 16)

Judge Hoffman dissented from TECA's majority decision dated March 18, 1985. He points out that classification occurs "... at the time of contracting" and that Chevron had a continuing obligation under the terms of each contract "... not to charge a price which exceeded the maximum lawful price under the regulations". Explicit in his dissent is that under the majority rule of "accrual", a supplier would absolve itself of "... all future violations by having the purchaser sign a release of a similar past violation". Judge Hoffman concluded: "A release of future violations is, without question, void against public policy . Pearlstein v. Scudder &

German, 429 F.2d 1136 (2d Cir. 1970), cert. denied, 401 U.S. 1013 (1971); Oberweis Dairy, Inc. v. Associated Milk Producers, Inc., 568 F.Supp. 1096 (N.D. Ill. 1983); Weinraub v. International Banknote Company, Inc., 422 F.Supp. 856 (S.D.N.Y. 1976); Korn v. Franchard Corp., 388 F.Supp. 1326 (S.D.N.Y. 1975)." (App. 19-21).

The TECA has thus decided an important question of federal law and public policy that should be settled by this Court.

II. A Release Is Void As Against Public Policy If It Is Obtained By Deceptive Practices And Economic Coercion In Circumvention Of The EPAA.

The TECA's decision is doubly harsh in this case because Chevron's original misclassification was based on its 1973 fraudulent misrepresentation which was neither known to nor discoverable by Bray companies prior to the signing of the release. (App. 138) The TECA's decision consequently runs afoul

of federal legal principle as well as public policy. Specifically, at the time of the release, even if Bray companies had knowledge of the "operative facts" of a straight "overcharge" claim,[2] without an examination of Chevron records, Bray companies could not possibly discover the fact that Chevron had not placed its customers on a uniform May 1 contract date.[3] Equally unlikely, was the prospect of Bray companies discovering that Chevron had advance knowledge of the May 15, 1975 freeze date.[4]

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[2] 10 C.F.R. §210.62(c) provides that a retroactive price increase violates federal price regulations if such increase "constitutes a means to obtain a price higher than is permitted by the regulations..." (App. 205)

[3] This is one truth underlying the 1973 misrepresentation, which was that Chevron was backdating the supply contract in order to put all its customers on a uniform starting date.

[4] This was the other underlying truth of the misrepresentation appearing in footnote 3. These "operative facts" lay buried in Chevron's files until brought to light during the course of discovery in the state proceedings. These facts, along with the true reason behind FEA's rescission of the NOPV, which was also found in Chevron's files, prompted Bray companies to file a complaint in federal district court.

To be valid, a release of federal claims must be an intentional relinquishment of a known right. Neuman v. Pike, 456 F.Supp. 1192, 1207 (S.D.N.Y. 1978); Properties v. Smith, 333 F.2d 568, 571 (9th Cir., 1964)[5]. It is true the measure of damages for an overcharge claim and for a claim of fraud in inducing one to forego EPAA rights (See Newman Oil Co. v. Atlantic Richfield Co., 597 F.2d 275 (Temp. Emer. Ct. App.), cert. den., 444 U.S. 842 (1979)) may be similar if the latter is a fraudulent misrepresentation resulting in an intentional misclassification.[6] However, the elements

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[5] This issue was briefed on appeal to TECA, and appears in Bray companies' Second Circuit appellate brief which was requested and reviewed by the TECA.

[6] The TECA found it necessary to decide whether §210(a) of the ESA permits consequential damages resulting from a fraudulent misrepresentation. Therefore, the measure of damages of a federal fraud claim under the Act has yet to be determined.

of the 1973 fraud required proof of an entirely different kind than is required to show an overcharge under the ESA and supporting regulations. (App. 134). In fact, the 1973 fraud was undoubtedly a state law claim that resulted in damages measured independently by state and federal law, respectively.[7] Further, both the district court and the TECA found the 1973 and 1974 contracts invalid.

The TECA apparently does not consider the federal judicial principle (which does not permit the release of an unknown cause of action (Neuman, Properties, supra), consistent with the public policy embodied in the EPAA and federal regulatory scheme. Whether known or unknown, however, the following regulations

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[7] Chevron has somehow escaped the consequences of "overcharges" for deliveries of product made May 1-15, 1973. The proper measure of damages for these overcharges are the terms of the 1968 contract set to expire May 31, 1973. The federal concept of "overcharges" is irrelevant to this claim. Likewise, it was improper to apply federal law to these pendent state claims, but this issue will be addressed subsequently.

prohibit any deceptive device, including a release, which is designed to circumvent federal regulations, whether or not such conduct amounts to actionable fraud: 10 C.F.R. §205.202 prohibits "... any practice that circumvents ... or results in circumvention ... of the requirements of any provision of this chapter ... as a violation of the DOE regulations stated in this chapter; 10 C.F.R. §210.62(c) prohibits "...(a)ny practice which constitutes a means to obtain a price higher than is permitted by the regulations in this chapter..."; 10 C.F.R. §212.82 provides "...(a) refiner may not charge to any class of purchaser a price in excess of the base price...". Section 210(a) of the ESA gives an unequivocal cause of action to "...(a)ny person suffering legal wrong because of any act or practice arising out of this title or any regulation issued pursuant thereto...". The TECA failed to recognize

these regulations as an expression of public policy. This policy clearly requires a release to be voided where a material misrepresentation has been made for the purpose of inducing a party to forego its EPAA rights. (App. 190-207)

Thus, if a distributor relies on these misrepresentations without investigating the underlying truth, an unknown fraud claim is not actionable and the regulations just cited above will provide no relief. Further, under the TECA's decision, a release will be valid even if the supplier inflicts actionable duress for the very purpose of obtaining a release. (App. 133)

The TECA also refused to recognize the federal principle developed in Ingram Corp. v. J. Ray McDermott, Inc., 698 F.2d 1295 (5th Cir., 1983) (A release is valid if it is an integral part of a scheme to violate federal law and to perpetuate that violation).

Accordingly, the TECA held:

> Even if we were to assume that this language provided another means in addition to a fraudulent inducement claim to attack the validity of a release, which we do not, plaintiffs have not shown on the facts of this case that the release is part of any such scheme. (App. 13-14)

The court added that the 1975 release was an "outgrowth", rather than a "cause" of the violation, and therefore not a part of any such scheme. (App. 14)

The court's distinction between an "outgrowth" and a "cause" is remarkable in light of the fact Chevron used the release as a means of terminating FEA's investigation in January of 1975. That Chevron used the release to perpetuate the misclassification in the 1975 supply contract has been determined by the district court and the TECA. Likewise, the fact that Chevron knowingly violated federal law from 1973 on is revealed by the district court's specific

determination of Chevron's intentional overcharge (App. 52-58) and deliberate falsehoods uttered to induce Mr. Bray to sign the 1975 release. (App. 77) If Ingram doesn't apply to this case, it's hard to imagine a case to which it would apply.

TECA's decision therefore condones the use of deceptive practices as a means to circumvent declared public policy which expressly prohibits the use of "any device" for such purpose.

Whether or not the EPAA policy favoring private settlement overrides the expressed public policies in matters of nationwide concern is an important federal question that should be resolved by this Court.

III. The TECA Has Decided An Important Federal Common Law Fraud Question In A Way Which Conflicts With Shappirio v. Goldberg, 192 U.S. 232 (1904), With Other Federal Courts Of Appeals, And With The Trend Of Modern Law.

The district court's grant of judgment

Frigitemp, supra, the TECA was actually tracing the development of the purported federal "access" principle. Frigitemp was a Rule 10b-5 - Securities case which stated in dicta, that ..."(e)ven at common law, if the plaintiff has been furnished with the means of knowledge and he is not prevented from using them, he cannot say that he has been deceived by the misrepresentations of the other party". Frigitemp, supra at p. 282, citing Shappirio v. Goldberg, 192 U.S. 232, 241-242 (1904). Shappirio, supra, was in fact cited by the district court as the controlling federal law relating to "blind reliance" and "readily available access".

Shappirio may represent the last controlling statement by this Court of the federal "access" common law principle of fraud.[8]

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[8] The "access" principle was expressly rejected in Dice v. Akron, C.&Y.R. Co., 342 U.S. 359, 362 (1952). Dice established the federal common law of fraud

See 33 A.L.R. 853, 917-918, Anno. - Fraud - Matters of Public Record §§22-24. However, it is quite clear the TECA's requirement of "due diligence" and determination of "access" is entirely inconsistent with the rule of that case.

This Supreme Court held in Shappirio, supra at pp. 241-242:

> There are cases where misrepresentations are made which deceive the purchaser, in which it is no defense to say that had the plaintiff declined to believe the representations and investigated for himself, he would not have been deceived. Mead v. Bunn, 32 NY 275 (party deceived not bound to test the truth of a representation by examining the public records). But such cases are to be distinguished from the one under consideration. When the means of knowledge are open and at hand or furnished to the purchaser or his agent, and especially where the purchaser undertakes examination for

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8 as it relates to a release under the Federal Employer's Liability Act for injuries sustained as a result of the negligence of an employer. This Court, in rejecting the "defense" of "supine negligence" (Plaintiff did not read the release he signed) held: "... a release of rights under the Act is void when the employee is induced to sign it by the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release".

himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor". (citations omitted)

The plaintiff's agent in Shappirio, unlike the plaintiff in Mead, actually undertook an investigation of the public record. He examined the recorded deed and plat and issued a "report upon the title" to Shappirio. The evidence in Shappirio, supra at p. 241, was undisputed that "...(a) casual reading of the description on the deed or examination of the recorded plat ... (would have revealed the truth)".

Shappirio was decided in 1904, before many states had rejected the doctrine of caveat emptor. Modern law has by and large opted for the principle that the "means of knowledge is open and at hand" only "when the recipient of the misrepresentation is capable of appreciating its falsity by the use of his senses". Restatement, Torts 2d §541, Comment a; cf. Prosser, Law of Torts, 4th ed. §107.

This is precisely the principle that a thoughtful reading of Shappirio reveals. 33 A.L.R. 853,918 ("The fact that the court referred, without any expression of disapproval, to Mead v. Bunn (1865) 32 NY 275 ... may be regarded as indicating somewhat strongly that it is prepared, whenever the point is directly presented, to adopt the broad doctrine applied in this case". (This ALR annotation was written in 1924)). Under this rule, "access" to a federal agency does not bar a fraud claim.

In federal courts, common law fraud claims usually arise in diversity cases, where the appropriate state law is applied under the Erie doctrine. Federal common law becomes an issue in cases where federal statutes create private claims. Two examples of this situation are the Federal Employer's Liability Act and Securities - Rule 10(b)5 violations. The former situation has been resolved by this

Court's articulation of federal common law as it relates to the Act. (Dice, supra, footnote 8). The latter has not been resolved and a conflict has arisen among the federal jurisdictions.

The Second Circuit, for instance, apparently adheres to the "access" principle. Frigitemp, supra. The Tenth Circuit relies on the Restatement of Torts, §§540,541:

> ... plaintiff is not duty bound to investigate the truth or falsity of an intentional misrepresentation unless the misrepresentation is patently false.

Holdsworth v. Strong, 545 F.2d 687 (10th Cir., 1976)

In fact, the difference between the Second and Tenth Circuits is more of terminology than anything else. Even under the "unrestricted access" doctrine of the Second Circuit, the defendant must first establish by uncontradicted evidence, (1) the existence and physical whereabouts of the "true facts",

and (2) plaintiffs' unrestricted access to those facts.[9] If the defendant fails to establish this defense as a matter of law, the fraud claim goes to the jury for determination on the merits. Grumman, supra at p. 740.

To illustrate, the court in Grumman concluded that summary judgment was proper where the defendants produced affidavits which showed plaintiff had a right of unrestricted access to defendants' plant, files and the performance test results of a particular model bus. Grumman, supra at pp. 738, 740. (The fraud claim concerned representations of good performance and quality of the bus - Grumman had contractually disclaimed reliance on those specific representations). Rohr's affidavits also established that Grumman possessed the "legal, technical and business expertise necessary to make effective use of that access". The defendants' affidavits were not opposed by any contrary facts pre-

sented by plaintiff. Grumman, supra at p. 740. The court held: "Grumman's right to unrestricted access and its failure to inquire preclude, as a matter of law, its claim of reliance on Rohr's alleged misrepresentations". But the Second Circuit also made it abundantly clear that if plaintiff had introduced specific facts tending to show its "access" was restricted, the fraud claim would have gone to the jury. Grumman, supra at p. 740.[10]

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[9] The "access" or "means of knowledge" principle is a defense, not an element of common law fraud. Mallis v. Bankers Trust Co., 615 F.2d 68,80, cert. den. 449 U.S. 1123 (1981) (New York does not recognize "due diligence" as an element of fraud, but rather requires proof of the five traditional elements: (1) misrepresentation of a material fact; (2) falsity of that representation; (3) scienter; (4) reliance; (5) damages. See also Shappirio and Dice, supra.

[10] Grumman cites Shappirio at p. 737.

Petitioners submit the TECA's mandate has clearly shifted to plaintiffs the burden of showing the "true facts" were not available to them. This is not the test, according to Shappirio. The only information plaintiffs ever received about the status of the FEA investigation was from Chevron. In addition, the following undisputed evidence was introduced: (1) the plaintiffs were not a party to the NOPV; (2) they were not copied by the FEA on any matters relating to the investigation of Chevron, including the NOPV and rescission notice; (3) prior to the date of the rescission notice, plaintiffs did make a request, by telephone and letter, for a decision. These requests were not responded to by the FEA; (4) three different FEA officials were involved with the NOPV. The point is that even if Chevron met its burden supporting the defense of "access", Bray companies introduced evidence which raised a genuine issue under any standard

Chevron certainly could have asked Mr. Costello, the FEA official in charge of the NOPV at the time of the notice of rescission, whether he would have disclosed the true nature of the rescission to Bray companies even though not a party to the NOPV. Chevron did not do so. Chevron could have asked Mr. Costello, during his deposition, (which perpetuated his testimony) whether the rescission notice became part of the public record or offered other evidence showing this to be the case. Chevron did not do this, either, in spite of the fact it has continuously asserted that Bray companies' lack of "due diligence" bars the claim of fraud. On the other hand, Bray Oil did not ask these questions because (1) it wasn't part of the prima facie case, and (2) it was irrelevant under Vermont law which was actually charged to the jury.[11]

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[11] The district judge applied "federal law" only on consideration of Chevron's Motion for J.N.O.V.

What Chevron actually did speaks for itself, and it doesn't come close to showing a "means of knowledge" defense under Shappirio. First, Chevron solicited as an "expert witness", one Melvyn Goldstein, a former director of the Office of Exceptions and Appeals of the FEA. Mr. Goldstein testified that he was "generally" familiar with NOPV procedures, and based on that "general familiarity" of these procedures, he was not aware of any obstacles that might confront a hypothetical Bray Oil in learning from the FEA the basis for a rescission of an NOPV. Mr. Goldstein also testified that he was unaware of any reason that the FEA would not provide the basis of the rescission to Bray Oil, if an inquiry had been directed at the FEA's regional counsel (Mr. Webster). Mr. Goldstein's lack of awareness of any obstacles in FEA regulations to the discovery of the truth, based on his "general familiarity' with the NOPV procedure, does not establish

much of anything. It does not establish that Mr. Webster[12] would have revealed the true facts to Attorney O'Brien on September 17, 1975, or that the "true facts" were a matter of public record, or for that matter that the FEA's disclosure of the basis of the rescission would have been timely. Outside of the general familiarity with NOPV procedures, Mr. Goldstein remained mute on the issue of "access".

In their appellate brief to the TECA, Bray companies pointed out that FEA regulations prohibited the production or disclosure of any and all materials "contained in the files of the FEO" without "prior approval of the General Counsel of FEO". 10 C.F.R. §202.22 (App. 206) It was also brought to the court's attention that information received during the course of an investigation remains

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[12] Neither Dana Bray nor his attorney, Donald O'Brien had ever heard of or met Mr. Webster prior to September 17, 1975 and did not believe Mr. Webster was involved with the Chevron NOPV in any event.

confidential "unless otherwise determined by FEA". 10 C.F.R. §205.201(e) (App. 207)

The TECA's conclusion that such regulations would not prohibit FEA disclosure of the meaning and effect of the rescission misses the issue entirely. Under these regulations, neither Costello nor Webster was free to disclose any information to Bray companies without prior approval of General Counsel.

On the other hand, if the NOPV and notice of "rescission" was a matter of public record, Bray companies would have been required to follow the procedures of the Freedom of Information Act. 5 U.S.C.S. §552. The main difficulty in contacting General Counsel or proceeding with the FOIA is that it was FEA's consistent practice through the summer and fall of 1975 to withhold any document, (including NOPV's) relating to ongoing investigations initiated by an NOPV.

Three related FEA decisions clarify this

point: Air Transport Association of America, 2 FEA 80502 (January 10, 1975); Larkin, et al., 4 FEA 80514 (July 22, 1976); and Wall Street Journal, 2 FEA 80558 (March 21, 1975).

In Larkin, supra, a request was made under the FOIA for a number of documents to an FEA investigation of Union Oil Company of California concerning the "lawful selling price of gasoline which Union sells to its retail customers". Larkin, supra at p. 80, 553. Larkin's request included "...(r)ecords of any formal or informal rulings, advice or counsel given by the FEA...". Because the investigation of Union was still in progress, the Information Access Officer withheld a Notice of Probable Violation (NOPV) (and other documents relating to the investigation) which the FEA issued to Union on August 9, 1974.

Larkin appealed, alleging the Information Access Officer erroneously withheld "access

to the requested documents". Larkin, supra at p. 80, 554.

The FEA held that "... NOPV's ... issued prior to the date of Wall Street Journal and which were used as discovery devices designed to further an investigation would be exempt from public disclosure while the investigation remained open". Larkin, supra at p. 80,554. The FEA also determined that the NOPV and other documents requested were exempt under our investigatory records provision of 5 U.S.C. §552(b)(7) because it revealed investigatory techniques and procedures of the FEA. Larkin, at p. 80,554.

Wall Street Journal, supra, citing Air Transport Association of America, supra, stated: "The FEA has consistently refused to disclose NOPV's on the grounds they are not subject to mandatory disclosure under Section (b)(7) of the Freedom of Information Act". (emphasis added) Wall Street Journal, at

p. 80,668.

Read individually or together, the three FEA decisions uphold the FEA practice of non-disclosure of any documents which relate to material compiled for investigatory purposes. Air Transport, supra at p. 80, 502. Air Transport also establishes the investigation is not completed until a Remedial Order is issued or the investigation is otherwise terminated.

In the case at hand, the "rescission" was not a termination of the investigation. (App. 77) It was notification to Chevron that the investigation was to be expanded to areas "technically" outside the scope of the NOPV. Further, the "rescission" did not serve as a formal statement of the alleged violations to be investigated and "rescinded" an NOPV which itself was not a "formal statement of charges issued after a significant stage of investigation (had been) completed".

Wall Street Journal, supra at p. 80,689.

Thus, it is quite apparent why Chevron did not produce evidence demonstrating plaintiffs' "unrestricted access" to the meaning and effect of the notice of rescission. It is also manifestly unfair for the TECA to reject federal statutes, regulations and FEA decisions which demonstrate, beyond a doubt, that "access" was restricted, if not totally unavailable. The TECA's "due diligence" rule is especially harsh where Vermont law is applied to the release by the district judge in his charge to the jury.

Another misleading conclusion of the district court, perpetuated by the TECA, was that there were "frequent contacts" between Bray companies and FEA officials. The district judge opined:

> Bray and Chevron representatives alike were in frequent contact with Mr. Costello and Mr. Webster concerning energy matters. (App. 94)

The undisputed evidence established absolutely no contacts between Webster and Bray and only one contact between O'Brien and Webster. Mr. O'Brien testified he did not know Webster prior to the Albany meeting on September 17, 1975, and did not believe he was involved in the handling of the NOPV.

Dana Bray met Mr. Costello only once in Burlington on May 1, 1975. Costello was present in furtherance of the Chevron investigation. Mr. O'Brien was also in attendance. The only remaining "contact" which O'Brien had with Costello was by telephone on May 27, 1974. The evidence showed that any discussions between FEA personnel and Bray companies were initiated by the FEA.

There were no "contacts" at all between representatives of Bray companies and FEA personnel after the telephone call of May 27,

1975, except at the Albany meeting. In short, there was one contact with FEA officials in the relevant time frame. The notice of rescission was dated July 28, 1975 and Chevron's written misrepresentation was dated August 28, 1975.

"Frequent contacts" is an egregious distortion of the evidence, especially in the context of a J.N.O.V. The TECA, in reviewing a grant of J.N.O.V. was duty bound to give Bray companies the benefit of all reasonable inferences without weighing conflicting evidence, and then uphold the jury's verdict unless the jury's findings could only have been the result of sheer surmise and conjecture or no reasonable or fair-minded man could have arrived at a verdict against Chevron. Mattivi v. Southern African Marine Corp., 618 F.2d 163 (2d Cir., 1980). If the TECA has, in fact, searched the record for 'substantial evidence' supporting the jury

verdict, it is not reflected in the mandate. (App. 1-21) The TECA relies solely on "frequent contacts" to show access and ignores all conflicting evidence.

The TECA paraphrases Shappirio ("if the plaintiff has been furnished with the means of knowledge and he is not prevented from using them, (emphasis added) he cannot say that he has been deceived by the misrepresentations of the other party), but it has in every essential misstated or misapplied the Supreme Court principle. The "opportunity to make inquiry" does not establish that such inquiry would have been fruitful and without difficulty. Even a broad reading of Shappirio or Grumman, supra, reveals the burden was on Chevron to establish just that.

This Court may also note that TECA has apparently adopted a federal tolling (statute of limitations) provision as the

federal common law of the case. Citing Western Mountain Oil, Inc. v. Gulf Oil Corp. 726 F.2d 765 (Temp. Emer. Ct. App. 1983) (The statute of limitations is not tolled by a fraudulent concealment of a cause of action if the true facts would have been discovered by the exercise of due diligence), TECA asserts the Western Mountain "due diligence" tolling provision should apply with greater force to a claim of fraud in the inducement of a release of federal claims. (App. 12)

The TECA's mandate has interpreted the Shappirio principle as being synonymous with a federal tolling provision. Further, a plaintiff asserting a federal common law fraud claim now has the burden of showing he acted with due diligence in order to verify a material representation. This ruling is a dangerous precedent which, by its language, purports to apply to any federal fraud claim. It also condones deceitful

and unlawful price gouging which is contrary to the public policy embodied in the emergency federal statutory scheme enacted at a time of national crisis.

IV. Congressional Intent, Public Policy, And The Decisions Of This Court Required The TECA To Determine The Validity And Scope Of The 1975 Release According To Vermont Law.

Insofar as the 1975 release related to federal claims, it is clear that the district judge was required to apply federal law. Dice, supra. The District Judge Holden adopted Vermont law as the federal law, and he so charged the jury. However, upon review of Chevron's motion for J.N.O.V., the district judge changed his mind and applied a somewhat confusing blend of authorities, the most notable being Shappirio, supra.

On appellate review, the TECA ostensibly adopted Shappirio by reference to Second Circuit case law. (App. 12) In reality, however, the TECA has misstated Shappirio

by equating that case with a federal tolling provision (App. 12).

Bray companies have thus been laboring under a quite elusive concept of federal common law fraud ranging from a near absolute right of reliance (Negyessey v. Strong, 136 Vt. 193, 195 (1980); Lunnie v. Gadapee, 116 Vt. 261, 265 (1950)) to a "means of knowledge" defense (Shappirio), and finally to a requirement of due diligence as part of the prima facie case. (Western Mountain, supra).

This problem has perhaps arisen because, since the time Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938) was decided, there has been no "general" federal common law, but only specialized federal common law that relates to particular areas of federal interest. U.S. v. Standard Oil Co., 332 U.S. 301, 308 (1947); Wright, Miller and Cooper, Federal Practice and Procedure: Jursidiction §4514. However, both the district court and

the TECA were subject to the choice of law principles laid down in the applicable decisions of this Court.

In 1979, the Ninth Circuit provided the following summary of these principles in United States v. Crain, 589 F.2d 996,999 (9th Cir., 1979):

> The federal courts are generally free to draw upon any and all traditional sources in developing federal common law. United States v. Best, 573 F.2d 1095, 1109 (9th Cir., 1978). Often state law is an appropriate source. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457, 77 S. Ct. 912, L. Ed. 2d 972 (1957) Royal Indemnity Co. v. United States, 313 U.S. 289, 296-97 61; S. Ct. 995, 85 L. Ed. 1361 (1941); Board of Commissioners v. United States, 308 U.S. 343, 350-52, 50 S.Ct. 285, 84 L.Ed. 313 (1939); United States v. Best,573 F.2d at 1102. Even when an 'action arises under and is clearly determined by federal law, state law limiting the enforcement of a federal right is sometimes adopted as the federal rule'. United States v. Hadden Haciendas Co., 541 F.2d 777, 783 (9th Cir., 1976)
>
> As stated in Hadden, whether or not state law will be adopted as the federal common law rule depends on 'whether the state law can be given

> effect without conflicting with federal policy.' id. at 784...(other citations omitted). Conversely, rejection of the state rule should be avoided where the adoption of a different federal rule would unduly interfere with the state's interests."

Vermont law is consistent with congressional intent and public policy embodied in the EPAA as well as traditional and modern common law fraud. One eloquent expression of the law appears in Crompton v. Beedle & Thomas, 83 Vt. 287, 301-302 (1910).

The court, in Crompton traces the origin of Vermont's rejection of the defense of negligence to an intentional misrepresentation:

> The doctrine (due diligence) inconsistent with that which has been declared by this Court is said by the writer last quoted (Bigelow) to be dead in England if it ever existed there and moribund in this country ...
>
> In a House of Lords case, this principle was thus declared by Lord Chancellor Chelmsford:
>
> 'When once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter a contract, it is no answer to his claim to be relieved

> from it to tell him that he might have known the truth by proper inquiry ...
>
> Any different doctrine carried to its logical conclusion would facilitate transactions in gold bricks, salted mines, bogus diamonds as real, facsimilies as originals, and would permit a variety of things destructive to commercial integrity. The maxim which requires a party to a trade to look out for himself has a wide and broad application. We would not traduce it or deny to it the legitimate application to which it is entitled. But it cannot be permitted that that maxim should be so construed as to portraying the law in caricature and to render it an instrument of craft, a tool of fraud, a talisman of injustice, a key by the use of which one man may plunder another. For the commerce of the world is promoted not by cunning but by such wisdom as is consistent with that good faith which underlies everything in the social order that has stability".

Vermont had a very real interest in keeping its citizens warm during a national fuel oil shortage, as well as a long standing commitment to integrity in the marketplace. See Crompton, supra. Yet the district court and now the TECA rejected Vermont law and the basis for that rejection cannot accurate-

ly be determined. The critical inquiry should have been "whether Vermont law could be given effect without violating federal policy". (Hadden, supra). Federal policy in turn, was subject to the "paramount authority of congress". New Jersey v. New York, 283 U.S. 336 (1931).

An expression of congressional intent is found in the EPAA, 15 U.S.C. §753(b)(1) (App. 193-199), and the following excerpts are particularly relevant:

(b)(1) The regulation under subsection (a) of this Section, to the maximum extent practicable, shall provide for --

(a) Protection of public health ... safety and welfare (including maintenance of residential heating, such individual homes, apartments, and similar occupied dwelling units), and the national defense.

(d) Preservation of an economically sound and competitive petroleum industry ...

and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent dealers, and branded independent marketers ... (emphasis added).

This intent is buttressed by §§208,209 and 210 of the ESA (as incorporated in the EPAA) which provide for criminal and civil penalties as well as private suits for damages or other relief for any "legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto". (App. 190).

Perhaps of even greater importance is that since 1979, several significant decisions involving federal common law have issued from this Court, including Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, 101 S.Ct. 1571 (1981); Texas Industries, Inc. v. Radcliffe Materials, Inc., 101 S.Ct. 2061 (1981) and City of Milwaukee v.

Illinois, 101 S.Ct. 1784 (1981).

An often cited and prominent authority has made an analysis of these decisions:

> These cases, read together, reveal at least one central theme: a renewed emphasis upon the fact that federal common law is 'subject to the paramount authority' of Congress. Indeed, the 1980-1981 Term cases may be read to say that courts generally should be reluctant to develop federal common law, absent some signal from Congress. If this reading is correct, then it is likely that future years will see a vastly more restricted use of federal common law".
>
> Wright, Miller & Cooper
> Federal Practice & Procedure
> Jurisdiction §4514 at p. 274

The EPAA was an emergency act designed to protect the citizens and the marketplace from price exploitation that would have inevitably attended the short supply of an essential product. The clear signal from Congress was that no deceptive practice would be tolerated during such conditions. To rule, as the TECA has done, that Vermont law is contrary to congressional intent and public policy, cannot

be justified.

V. The Erie Doctrine Required The TECA To Apply Vermont Law To A Release Of A Pendent State Fraud Claim.

The federal court acquired pendent jurisdiction over the 1973 fraud claim. It charged Vermont law to the jury, and the court upheld the jury determination of fraud on the basis of Vermont law. (App. 144) The material misrepresentation itself, related to the retroactive date of the "as of May 1, 1973" contract.

In his July decision, the district judge confirmed that under Vermont law, the terms of the prior contract will be substituted for a subsequent contract procured through fraud. (App. 175) The federal price regulations were therefore not the sole measure of damages. The measure of damages was the price terms of the prior contract, at least through May 31, 1973 when the prior contract was set to expire. Thus,

the source of this claim is state law, and under Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938) state law must be applied to a release of a state claim. Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538 (2d Cir., 1956) ("... the Erie doctrine applies, whatever the ground for federal jurisdiction to any issue or claim which has its source in state law".); cf. United Mine Workers v. Gibbs, 383 U.S. 715 (1966) and Dice, supra: (Federal law applies to a release of federal claims).

The TECA as well as the district court, plainly erred in applying federal law to a release of a state claim. (App. 17-18) This error underscores the confusion of the TECA in construing the scope and the validity of the release. The decision of the TECA should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

JOHN P. MONTE, ESQ.
Attorney of Record

RICHARD E. DAVIS, ESQ.
Attorney for Petitioners

May 23, 1985

APPENDIX

Temporary Emergency Court of Appeals of the United States

Nos. 2-41, 2-42, 2-45, 2-46

NORTHERN OIL COMPANY, INC., BRAY OIL COMPANY, INC., NORTHERN TERMINALS, INC., and DANA S. BRAY,
PLAINTIFFS-APPELLANTS AND CROSS-APPELLEES,

v.

STANDARD OIL COMPANY OF CALIFORNIA and CHEVRON U.S.A. INC.,
DEFENDANTS-APPELLEES AND CROSS-APPELLANTS.

Appeal from the United States District Court for the District of Vermont

(Civil Action 78-231)

Argued January 18, 1985 Decided March 18, 1985

Judgment Entered: March 26, 1985

RICHARD E. DAVIS, Richard E. Davis Associates, Inc., Barre, Vermont, with whom David L. Cleary, Miller, Norton & Cleary, Rutland, Vermont, were on the brief, for Plaintiffs-Appellants and Cross-Appellees.

JEFFREY S. FACTER, Cravath, Swaine & Moore, New York, N.Y., with whom Allen F. Maulsby, Steven H. Rouhandeh and Robin C. Landis, of the same firm, were on the brief; Douglas C. Pierson and Richard W. Affolter, Pierson, Affolter & Wadhams, Burlington, Vermont, of Counsel, for Defendants-Appellees and Cross-Appellants.

Before HOFFMAN, GIGNOUX and METZNER, Judges.

METZNER, Senior District Judge:

This is an action for overcharges, and for consequential and punitive damages, under Section 210(a) and (b) of the Economic Stabilization Act of 1970 ("ESA"), 12

U.S.C. § 1904 note (1980 Supp.), as incorporated in the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 751 *et seq.*, for violations of various regulations implementing the EPAA, and for common law fraud, brought in 1978 by plaintiffs-appellants and cross-appellees Northern Oil Company, Inc., Bray Oil Company Inc., Northern Terminals, Inc., and Dana S. Bray, as owner of the three companies (hereinafter collectively referred to as "Bray Oil"), against defendants-appellees and cross-appellants Standard Oil Company of California ("SoCal") and its wholly-owned subsidiary Chevron U.S.A. Inc. ("Chevron"). Both sides appeal from a final judgment entered on April 10, 1984, by Judge Holden in the District of Vermont which awarded plaintiffs $210,000 in damages for overcharges by Chevron on the price of home heating oil, prejudgment interest, statutory penalties of $210,000 and attorneys' fees and other expenses.[1]

BACKGROUND

The complex factual background of this case is more than adequately set out in three comprehensive opinions by Judge Holden. For present purposes we outline the facts upon which our decision is predicated.

During the time period relevant to this action, Bray Oil was a major distributor of home heating oil in New York and Vermont. Since 1968 it had purchased its product from Chevron pursuant to a contract effective by its terms until May 31, 1973. Under the terms of that contract, Bray Oil purchased product at prices posted by Chevron at Albany, New York, and Burlington, Vermont,

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[1] Chevron filed a counterclaim to collect the unpaid balance on a promissory note from plaintiffs. An earlier state court suit on this issue was stayed pending the outcome of the federal litigation. Judge Holden granted judgment on that counterclaim for an aggregate amount in excess of $3.2 million. Plaintiffs have not challenged that judgment on this appeal.

minus certain discounts. Well before that contract was due to expire the parties began negotiations for a new contract. Chevron demanded, among other things, pricing terms more favorable to it because its profits under the old contract had steeply declined.

In early May of 1973 Chevron made several deliveries which Bray Oil accepted and later paid for at a higher price than provided for in the written contract in effect at the time of the deliveries. In July of 1973, after hard bargaining between the parties, Chevron convinced plaintiffs to enter into a new contract with pricing terms F.O.B. New York Harbor. This new contract also provided that it would be effective "as of May 1, 1973." Chevron informed Bray Oil that it desired the backdating in order to have all its customers signatory to contracts with that uniform date. The jury found at trial that this representation was false or misleading, and that Bray Oil relied on the representation in agreeing to the backdating of the contract.

On July 19, 1973, after many but not all of the documents comprising the new contract had been signed, the Cost of Living Council ("COLC") proposed for notice and comment a regulation fixing May 15, 1973, as the freeze date for Phase IV of the federal energy regulatory program. The last of the documents comprising the "as of May 1, 1973" contract were signed on August 13, 1973. On August 19, 1973, the freeze date of May 15, 1973, was adopted. 38 Fed. Reg. 22536, 22541 (August 22, 1973).

Once the price regulations were promulgated, Chevron placed Bray Oil in a "class of purchaser" (10 C.F.R. § 212.31) reflecting the new backdated contract terms rather than those of the old contract which had been in effect on May 15, 1973. Because of this, Chevron was able to and did charge Bray Oil a higher price under the regulations than would have been lawful if Bray Oil had been classified pursuant to the price terms of the old contract.

In the summer of 1973 Bray Oil transferred nearly seven million gallons of heating oil to one of its customers, Green Mountain Petroleum Company, and received more than one million dollars in payment without reporting the transaction to Chevron (the "Green Mountain transaction"). This violated the consignment terms of Bray Oil's contract with Chevron. Chevron learned of the Green Mountain transaction by chance six months later. As a result of this transaction, Chevron insisted on new credit terms when the parties negotiated a new agreement for 1974-75. The 1974-75 contract established a fixed schedule of payments based on the 1972 pattern of withdrawals.

Subsequently, one of Bray Oil's customers filed a complaint with the Federal Energy Administration ("FEA") concerning the change in credit terms. On October 24, 1974, the FEA issued a Notice of Probable Violation ("NOPV") to Chevron and commenced an investigation. As a result, in November of 1974, Bray Oil unilaterally ceased paying Chevron in accordance with the fixed payment schedule of the 1974-75 contract and instead returned to the previous consignment arrangement. Chevron did not challenge Bray Oil's action because of the FEA's ongoing investigation regarding the NOPV. Because the winter of 1974-75 was mild, the payments for withdrawals were less than what would have been called for by the fixed payment schedule.

The parties failed to resolve their differences before the expiration of the 1974-75 supply contract on May 1, 1975. On July 24, 1975, the FEA notified Chevron that it was rescinding the NOPV in order to broaden the investigation to include the retroactive effect of the "as of May 1, 1973" contract, but that it would be unable to proceed with the investigation until it had greater manpower. In a letter dated August 28, 1975, Chevron informed Bray Oil of the rescission, but not the reason for it.

At that time both parties were under pressure to reach an agreement. With the rescission of the NOPV, Chevron had put Bray Oil on a "cash first" delivery basis, which precluded Bray Oil from being able to purchase its full needs for the winter. In addition, the transportation of product would become increasingly difficult as the weather worsened. For its part, Chevron feared adverse publicity if a shortage of home heating oil developed. After mediation by FEA and state officials, the parties on October 14, 1975, reached agreement on the 1975-76 supply contract. In conjunction with that agreement, Chevron agreed to an interest-free promissory note on the substantial debt owed it by Bray Oil. Bray Oil in turn signed a general release which purported to release Chevron from any claims, including those under the EPAA, Bray Oil may have had stemming from the relationship between the parties under the "as of May 1, 1973" contract.[2]

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[2] The release provides as follows:

"IT IS AGREED by and between Chevron and Bray that Chevron hereby releases Bray and Bray hereby releases Chevron and each of them hereby releases each of their respective parent corporations, if any, affiliates, successors and assigns, servants, agents and employees, from and against any and all loss, cost, claims, damages, liabilities, actions, and causes of action which each may have or which each may allege to have had against the other arising out of actions, agreements, contracts, commitments, relationships or action taken or omitted to be taken up to the date hereof based on tort, contract, negligence, anti-trust or violation of State or Federal Regulations excluding, however, the following:

A) Payments under Agreements existing immediately prior to the execution hereof with respect to the sale of products referred to therein, payment for which is not to be made prior to the effective date hereof and which have not otherwise been resolved as between Chevron and Bray,

B) Obligations undertaken by Bray and its affiliates, or any one or more of them, with respect to

Following the expiration of the 1975-76 contract, Mr. Bray sold or leased his various properties and retired to Florida, leaving behind a substantial balance on the promissory note as well as other obligations to Chevron.

The instant suit was commenced in 1978 and resulted in a bifurcated trial. In the liability phase, which lasted seven months, the jury returned eleven special verdicts with a total of 52 subparts. The jury found, among other things, that at the time Chevron was negotiating a new contract with plaintiffs in 1973, it represented to Mr. Bray that the reason for selecting the "as of May 1, 1973" starting date was to place all distributors of middle distillates on a uniform contract year. The jury found that this representation was false or misleading, that Mr. Bray relied on the representation, and that plaintiffs suffered financial harm as a result of signing the 1973-74 contract. The jury found as well that Bray Oil had no knowledge

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financing loans, through banks, the re-payment of which loans Chevron has guaranteed at the request of Bray and its affiliates, or any one of them, and

C) Obligations undertaken by Chevron and/or Bray arising out of Agreements executed on or after this date in the resolution of past differences.

Bray, by its execution hereof, acknowledges the validity of certain arrangements entered into between it and Chevron dated as of May 1, 1973 and as of May 1, 1974 relating to the purchase and sale of petroleum products.

Bray further acknowledges that it shall file no claim, complaint or charge for its own intended benefit, or that of others, nor be entitled to retain the benefit of the disposition of a claim, complaint or charge filed by any other party with the Federal Energy Administration involving Chevron's allocation and pricing practices towards Bray under Acts or Regulations relative to Federal Price Control and Allocation Regulations presently within the jurisdiction of the Federal Energy Administration."

at the time regarding the COLC consideration of the proposed freeze date.

Relying on the jury's findings, the district court held that Chevron's misrepresentation of its reason for seeking the backdating term amounted to fraud which invalidated the entire contract. The court therefore classified plaintiffs according to the terms of the old contract, and determined that Chevron had overcharged plaintiffs under 10 C.F.R. § 212.82 and Section 210(b) of the ESA. The court concluded, however, that the release executed by Bray Oil in 1975 barred recovery for overcharges made prior to its execution.

DISCUSSION

Numerous issues have been raised on this appeal by both sides. The most important one involves the validity and effect of the mutual general release executed on October 14, 1975. Bray Oil asserts on appeal that the district court erred in setting aside special verdicts in which the jury found that Chevron had fraudulently induced Bray Oil to execute the release. Chevron contends in its cross-appeal that the district court erred in holding that the release does not bar the claim for overcharge damages based upon deliveries made after October 14, 1975.

I. *The Release*

A. *Jurisdiction*

We turn first to the question of this court's jurisdiction to determine the issue of the validity and effect of the release. It is clear that this court has jurisdiction over an issue when "resolution of the litigation in its entirety requires the application or interpretation of the EPAA and regulations, and [when] an EPAA issue has been adjudicated in the district court." *Mobil Oil Corp. v. Department of Energy*, 728 F.2d 1477, 1497 (Temp. Emer.

Ct. App. 1983) (citations omitted). *See also Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375, 1381 (10th Cir. 1978) (case arises under the EPAA if it "clearly and substantially involves a dispute or controversy respecting the validity, construction or effect of such laws which is determinative of the resulting judgment"), *cert. denied*, 441 U.S. 952 (1979). *Accord Scallop Corp. v. Tully*, 705 F.2d 645, 647 (2d Cir. 1983). Our jurisdiction has been construed as "issue jurisdiction." *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979); *Texaco, Inc.* v. *Department of Energy*, 616 F.2d 1193 (Temp. Emer. Ct. App. 1979). As the court noted in *Texaco*, "jurisdiction is not an either-or proposition with regard to the case as a whole. Rather the Court takes jurisdiction over those issues which it has authority to decide, refusing to hear any others, although they are part of the same case or controversy." *Id.* at 1197.

As a general rule, this court has declined jrisdiction and permitted a bifurcated appeal only where the issues over which it declines jurisdiction provide an independent substantive ground for relief, or will not facilitate the decision of an EPAA claim. *See Atlantic Richfield Co. v. Department of Energy*, 655 F.2d 227, 233 (Temp. Emer. Ct. App. 1981) (purely private contract claims); *Longview Refining Co. v. Shore*, 554 F.2d 1006, 1009 n.5 (Temp. Emer. Ct. App.) (antitrust and contract claims), *cert. denied*, 434 U.S. 836 (1977); *Spinetti v. Atlantic Richfield Co.*, 522 F.2d 1401, 1403 (Temp. Emer. Ct. App. 1975) (antitrust, fair trade and fraud claims).

In *Newman Oil Co. v. Atlantic Richfield Co.*, 597 F.2d 275 (Temp. Emer. Ct. App.), *cert. denied*, 444 U.S. 842 (1979), we held that this court had jurisdiction over a cause of action arising from a fraudulent representation intended to induce a party to forgo EPAA rights. 597 F.2d at 279. The release issue in this case is under appeal precisely because Bray Oil contends that Chevron made a

false representation to it which induced it to sign a release forgoing any EPAA rights it might have had. *Newman Oil* therefore controls this case. *See also Rainey v. Union Oil Co. of California*, 732 F.2d 1563, 1564, n.1 (Temp. Emer. Ct. App. 1984) (breach of contract and tortious interference with contract claims adjudicated because of interdependency with EPAA claims); *Mobil Oil Corp. v. Department of Energy*, 728 F.2d at 1497 (exercising jurisdiction to decide issue of contract interpretation because "incident to and interwoven with," overcharge claim); *Francis Oil and Gas Inc. v. Exxon Corp.*, 687 F.2d 484, 487 (Temp. Emer. Ct. App.) (breach of contract claim that alleges entitlement to a specific price based upon the federal price regulations clearly falls within TECA jurisdiction), *cert. denied*, 459 U.S. 1010 (1982).

B. *Validity of the Release*

In a long and carefully reasoned discussion of the evidence and the applicable law, the district court set aside those special verdicts of the jury which indicated that the release of EPAA rights given by plaintiffs in conjunction with the signing of the 1975-76 contract had been induced by fraud on the part of Chevron. The district court concluded that the release was obtained as the result of hard bargaining between two sophisticated commercial entities, and that plaintiffs had not in fact relied on any misrepresentation Chevron may have made regarding FEA action concerning the relationship between the parties. The court also held that under federal law applicable to the release plaintiffs had no right to rely blindly on any misrepresentation Chevron may have made because plaintiffs had adequate access to information regarding the rescission of the NOPV. Plaintiffs raise four objections to the district court's holding. After careful consideration, we hold that none has merit and affirm the district court's ruling that as a matter of law the release was valid.

Plaintiffs first argue that the district court erred because in setting aside the special verdicts it necessarily passed upon the credibility of witnesses and so usurped the jury's function. The evidence must be viewed in the light most favorable to the plaintiffs here. *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970). The standard for reviewing the district court's action is whether "the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict . . ." *Brady v. Southern Railway Co.*, 320 U.S. 476, 479-80 (1943).

Our review of the evidence discloses that on July 24, 1975, the FEA informed Chevron by letter that it was rescinding the NOPV it had issued the year before, but would, when it had available manpower, broaden the scope of the investigation to include possible violations stemming from the backdating of the "as of May 1, 1973" contract. Chevron later informed Bray Oil of the rescission in a letter dated August 28, 1975, but did not state the reason for or the effect of the rescission.

The claim of fraudulent inducement is in essence based upon the allegation by Mr. Bray that a few days after receipt of that letter he received a telephone call from a Chevron employee stating that the FEA had found Chevron innocent of any wrongdoing in the handling of the Bray Oil account. Bray Oil asserts that this false statement caused it to believe that it no longer had EPAA rights against Chevron, and induced it to sign the release.

As noted above, Bray is a sophisticated businessman represented by counsel. A telephone call or letter to the FEA would have revealed the true facts. Neither was availed of by Bray. Moreover, Bray and his attorney were often in contact with FEA officials, including a lengthy meeting on September 17, 1975, but never asked about the rescission of the NOPV. Finally, Bray admits that after these representations were made, he was

advised by his attorney, in a letter dated September 9, 1975, to proceed with a complaint before the FEA.

Although Judge Holden charged the jury under Vermont law on this issue, he later correctly determined that federal law governed the validity and effect of the release. *See Locafrance U.S. Corp. v. Intermodal Systems Leasing, Inc.*, 558 F.2d 1113, 1115 (2d Cir. 1977) (federal law governs all questions relating to purported releases of federal statutory causes of action). *See also Dice v. Akron, Canton & Youngstown Railroad Corp.*, 342 U.S. 359, 361 (1952). We find that the district court was clearly correct in ruling that as a matter of federal law plaintiffs were under a duty to investigate the true status of the FEA action and were not entitled to rely on the representations of their adversary in the midst of negotiations when they had several opportunities to make such inquiry of the FEA itself.

This court has specifically held that in forgoing the assertion of rights under the EPAA, a buyer cannot blindly rely on a false statement by a seller as to action taken by an enforcement agency when the buyer has access to that agency. *Western Mountain Oil, Inc. v. Gulf Oil Corp.*, 726 F.2d 765 (Temp. Emer. Ct. App. 1983). In *Western Mountain*, the court rejected a fraud claim similar to the one here asserted by Bray Oil. Plaintiff in that case asserted that the statute of limitations had been tolled by defendant's false representation that the FEA had approved its pricing structure.

This court held, however, that though the statement may have been false, it did not constitute fraudulent concealment because plaintiff had a duty to investigate:

> "While Gulf may have wrongfully asserted the propriety of its pricing method, we do not find that appellant was entitled to blindly rely on that assertion without making any further investigation. Nor do we find the existence of any fiduciary relationship

> between the parties which might excuse the duty of further investigation."

726 F.2d at 768.

Western Mountain makes clear that Bray Oil had no right to reply blindly on any false statement by Chevron made during negotiations when Bray Oil clearly had access to the true facts regarding the rescission of the NOPV.[3] *See also Grumman Allied Industries, Inc. v. Rohr Industries, Inc.*, 748 F.2d 729, 737-38 (2d Cir. 1984) (recognizing principle of federal and New York common law that misrepresentation made during business negotiations not actionable if adversary had access to information); *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, N.A.*, 731 F.2d 112, 123-24 (2d Cir. 1984) (concealment of material fact during negotiations surrounding a business transaction not actionable fraud if adversary had access to, but did not pursue investigation of, true fact); *Frigitemp Corp. v. Financial Dynamics Fund, Inc.*, 524 F.2d 275, 282 (2d Cir. 1975) ("if the plaintiff has been furnished with the means of knowledge

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[3] The fact that in *Western Mountain* the fraud claim was asserted to avoid the operation of the statute of limitations does not diminish its application here. Indeed, its rule applies with even greater force to an effort to avoid a release. While for policy reasons courts have tended to disfavor strict enforcement of statutes of limitations, they have generally favored strict enforcement of releases granted in a commercial context for valuable consideration and with advice of counsel. *Compare Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314-16 (reflecting willingness to permit impact of statutes of limitation to be restricted), *reh'g denied*, 325 U.S. 896 (1945) *with Locafrance U.S. Corp. v. Intermodal Systems Leasing, Inc.*, 558 F.2d at 1115 (encouraging enforcement of releases made in commercial context where language of release is clear), and *Ruskay v. Waddell*, 552 F.2d 392, 398 (2d Cir.) ("strong policy considerations require that what all parties thought to be a closed matter [by virtue of a general release] should remain so."), *cert. denied*, 434 U.S. 911 (1977).

and he is not prevented from using them he cannot say that he has been deceived by the misrepresentations of the other party.").

The regulations cited by plaintiffs, 10 C.F.R. § 202.9 and § 205.201(e), clearly do not prohibit the release by the FEA of the fact and effect of the rescission of a NOPV. Such regulations were designed solely to protect the confidentiality of business information supplied by parties to the NOPV and the integrity of the internal processes of the agency itself.

Plaintiffs next argue that as a matter of law the release is contrary to public policy. We have made it quite clear, however, that the EPAA embodies a policy favoring private settlement of disputes under the statute. *See Longview Refining Co. v. Shore*, 554 F.2d at 1012. There is no public policy which prohibits an otherwise valid release from operating to bar federal statutory causes of action. *See Mittendorf v. J. R. Williston & Beane, Inc.*, 372 F. Supp. 821, 835 (S.D.N.Y. 1974).

Plaintiffs also argue that the release is void as a matter of public policy because it is an involuntary relinquishment of federal rights. It is abundantly clear, however, that "involuntary relinquishment" is not an independent ground for setting aside a release, but merely a shorthand reference to the traditional grounds for rescission—which the district court held inapplicable both because plaintiffs knew they were releasing claims that they might have under the EPAA against Chevron and because they were not entitled as a matter of law to rely on statements made by adversaries under such circumstances. This contention therefore adds nothing to the plaintiffs' case.

Finally, plaintiffs contend that the release is void because it is part of an integral scheme to violate federal law and to perpetuate that violation. The rely on *Ingram Corp. v. J. Ray McDermott, Inc.*, 698 F.2d 1295 (5th Cir.

1983), an antitrust conspiracy case which discussed the possible application of such a standard to a future case whose facts merited it. Even were we to assume that this language provided another means in addition to a fraudulent inducement claim to attack the validity of a release, which we do not, plaintiffs have not shown on the facts of this case that the release is part of any such scheme. As the court noted in *Ingram*, if the release is merely an outgrowth, rather than a cause, of the violation, it cannot be part of any such scheme. 698 F.2d at 1315.

C. *Scope of the Release—Statutory Claims*

In construing the scope of the release, we must give effect to the intent of the parties, as demonstrated by the language of the release itself and the circumstances surrounding its execution. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 342-48 (1971). We agree with the district court that by the plain language of the release, the parties settled all claims under previously existing contracts in the context of the applicable federal law and regulatory scheme.

The district court went on to hold, however, that the release did not bar claims for damages in the contract year following its execution because the cause of action for these damages accrued after the release had been executed. The court stated that the "release executed by Bray barred matured claims then accrued; it did not bar claims that might arise from future violations of federal law." In a later decision confirming its prior ruling, the district court held that prospective application of the release would offend public policy and undermine the policy of the price freeze regulations to maintain the supplier-purchaser relationship as it was in 1972-73.

This court has consistently held, however, that a cause of action for an overcharge based on an improper classification accrues at the time of the original improper classification. *Western Mountain Oil, Inc. v. Gulf Oil Corp.*,

726 F.2d at 767; *Fleetwing Corp. v. Mobil Oil Corp.*, 726 F.2d 768, 770 (Temp. Emer. Ct. App. 1983); *Lerner v. Atlantic Richfield Co.*, 731 F.2d 898, 900-01 (Temp. Emer. Ct. App. 1984). In these cases this court has clearly rejected the "continuing violation" theory in the context of actions for overcharges based on an improper classification. *See also Siegal Oil Co. v. Gulf Oil Corp.*, 701 F.2d 149, 153 (Temp. Emer. Ct. App. 1983) (continuing violation concept rejected as to claim under substitute supplier rule). The fact that the instant case involves a release, while the cases referred to involve the application of the statute of limitations, is a distinction without a difference in this case. We find no legitimate policy reason for allowing a party to escape the effects of an otherwise valid release more easily than he could a statute of limitations. The cause of action for all damages arising from the improper classification, therefore, accrued prior to the execution of the release.

The general proposition that public policy precludes the application of a release to bar claims that arise from future violations of federal law is therefore not an issue here. *See Fox Midwest Theatres, Inc. v. Means*, 221 F.2d 173, 180 (8th Cir. 1955); *Pearlstein v. Scudder & German*, 429 F.2d 1136, 1143 (2d Cir. 1970), *cert. denied*, 401 U.S. 1013 (1971); *Weinraub v. International Banknote Co., Inc.*, 422 F. Supp. 856, 858 (S.D.N.Y. 1976). This case does not invoke the policy concerns inherent in the situation where a release purports to allow a knowingly guilty party to violate federal law in the future. Since the cause of action for any overcharges during the contract year 1975-76 arose at the time of misclassification in 1973; there is no future violation present here. There are only future damages arising from a past violation.

It is clear that parties may agree to release claims of future damages arising from past violations of federal law where the cause of action for the past violation

had accrued at the time the release was executed. *See United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 853-54 (5th Cir. 1975) (release bars all Title VII claims for damages incurred because of continuing effects of past violations, *cert. denied*, 425 U.S. 944 (1976); *Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1022 (S.D. Tex. 1972) (release bars damages from pre-release activity not consummated until after release executed). *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. at 348 (parties may validly release future damages).

Judge Holden held that the *Western Mountain* rule as to the accrual date of overcharge claims was inapplicable to this case because of certain exclusionary language in the release:

> "While the argument has some surface appeal, it ignores the particular language of the 1975 release agreement which carves out three exceptions from its operation and effect. One of these exclusions is
>
> > [C] Obligations undertaken by Chevron and/or Bray arising out of Agreements executed on or after this date in the resolution of past differences.
>
> It seems clear enough to the court that overcharges resulting from a misclassification grounded in fraud which was carried forward to the supply agreement 'executed on or after' October 14, 1975, were not extinguished.
>
> While the release purported to compromise any claims of fraud that attended the prior arrangements 'as of May 1, 1973 and as of May 1, 1974,' it specifically excluded the contract relating to sale and purchase of petroleum products executed on or after the date of the settlement."

From the face of the release and the evidence in the record, however, it is quite clear that this exclusionary language applied only to a promissory note executed that

day to resolve past differences between the parties concerning certain debts. Other exclusionary language regarding payments under already existing agreements is equally inapplicable. Both parties understood that the release was drafted to preclude any challenges to the pricing and credit terms of the "as of May 1, 1973" and May 1, 1974 contracts.[4]

The district court therefore erred in holding that the release does not bar claims for overcharge damages in the contract year following its execution.[5]

D. *Scope of the Release—Common Law Claims*

The district court held that plaintiffs' exclusive remedy in this action was damages for overcharges under Section 210(b) of the ESA. Plaintiffs claim that they have suffered other legal wrongs separate from the overcharges which should be compensable under Section 210(c) of the ESA. These wrongs, plaintiffs claim, stem from common law fraud and the consequential loss caused because the overcharges placed them in a noncompetitive market position ultimately causing the sale of the businesses below fair market value.

Our holding as to the validity of the release makes it unnecessary for us to consider the correctness of the district court's ruling that plaintiffs' damages were limited to those provided under Section 210(b). The release effec-

[4] Indeed, as Bray Oil's attorney testified, he and his client were aware prior to the signing of the release that "once [the validity of the 1973-74 contract] was resolved, well, then that resolution would extend throughout the time that this particular commodity, petroleum, was regulated." (Tr. 7672; Def. App. No. 2-42 at 168).

[5] We need not address plaintiffs' claim that the negotiation and execution of the "as of May 1, 1973" contract violated various other EPAA regulations. The release bars recovery for any damages stemming from the alleged violation of all EPAA regulations.

tively bars recovery for any damages stemming from common law fraud based on the negotiation of the "as of May 1, 1973" contract.

II. *The Change in Credit Terms in the 1974-75 Contract*

Bray Oil also claims that the district court erred in finding that a change in credit terms in the 1974-75 contract from a consignment arrangement to a fixed payment schedule did not violate 10 C.F.R. § 210.62(a). Our holding as to the validity of the release, however, makes it clear that Bray Oil would be barred from recovering any damages realized prior to the date of the release arising from the change in credit terms. For the same reasons noted above regarding overcharge claims based upon an improper classification, we hold that the release has prospective effect to bar recovery for any damages stemming from the change in credit terms in the 1974-75 contract. *See Shell Oil Co. v. Nelson Oil Co.*, 627 F.2d 228, 236 (Temp. Emer. Ct. App.) (cause of action for change in credit terms accrues when acts constituting challenged change occurred), *cert. denied*, 449 U.S. 1022 (1980).

In view of our holding that plaintiffs released their claim for overcharge damages realized in each of the three contract years in question, we vacate the district court's award of prejudgment interest, penalty damages, attorneys' fees and other expenses.

The judgment below is affirmed in part and reversed in part and the matter remanded to the district court for entry of final judgment in favor of the defendants.

HOFFMAN, Judge, concurring in part and dissenting in part:

While I agree with the majority as to the principal points discussed in the opinion, I do not agree with the discussion in part I-C relating to the Scope of the Release. The Release is quoted verbatim in footnote 2 of the opinion and will not be repeated in detail.

The Release, executed on October 14, 1975, mutually releases any "causes of action which each *may have* or which each may allege to *have had* against the other arising out of actions, agreements, contracts, commitments, relationships or action taken or omitted to be taken *up to the date hereof* based on tort, contract, negligence, antitrust or violation of State or Federal Regulations excluding, however, the following:

> [C] Obligations undertaken by Chevron and/or Bray arising out of Agreements executed on or after this date in the resolution of *past* differences.

The Release continues:

> Bray, by its execution hereof, acknowledges the validity of certain arrangements entered into between it and Chevron dated as of May 1, 1973 and as of May 1, 1974 relating to the purchase and sale of petroleum products.

This Release does not refer to future violations by Chevron, concerning which the majority opinion has held are barred by the release. While it is true that the Release acknowledges that the 1973 and 1974 arrangements were valid, both the district court and the majority opinion have held to the contrary.

In my opinion, the district court correctly construed the Release, and its judgment should be affirmed in every respect. To hold, as does the majority, that a continued violation by Chevron after October 14, 1975, is permissi-

ble and bars the victim from a right of action, would, in my view, *be contrary to public policy.*

The majority relies upon *Western Mountain Oil, Inc. v. Gulf Oil Corp.*, 726 F.2d 765 (Temp. Emer. Ct. App. 1983), for the proposition that the cause of action accrues at the time of the original improper classification. *Western Mountain*, however, is clearly distinguishable from the case at bar. In *Western Mountain*, the plaintiff brought suit on a claim of having been overcharged. The court ruled that the claim was barred by the statute of limitations. There was only one three-year contract involved [1] and the plaintiff brought suit after the contract expired. The plaintiff in that case had argued that each delivery of petroleum constituted a violation. The *Western Mountain* court held that the cause of action accrued when the overcharging commenced at the beginning of the contract.

The policy underlying the statute of limitations supports the conclusion in *Western Mountain*. If it is deemed to be a separate violation each time any petroleum is delivered, then a company would be forced to re-examine its classification of each purchasers each time there is a delivery. This would be an onerous burden to impose upon the companies. It is at the time of contracting that the supplier classifies the purchaser.

In the case *sub judice* there were three separate contracts. The contract term which placed Bray in the wrong class of purchasers first appeared in the 1973-74 contract. This term was repeated in the two subsequent contracts. We are only concerned with the last contract covering the

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[1] The other cases cited by the majority, *Fleetwing Corp. v. Mobil Oil Corp.*, 726 F.2d 768 (Temp. Emer. Ct. App. 1983), and *Lerner v. Atlantic Richfield Co.*, 731 F.2d 898 (Temp. Emer. Ct. App. 1984), do not state whether there was more than one contract involved. Furthermore, they merely rely upon *Western Mountain* on this issue.

year 1975-76. The release was signed on October 14, 1975 at the same time the 1975-76 contract was signed. The cause of action for overcharges in the 1975-76 contract year accrued at the beginning of the contract. In that contract Chevron improperly classified Bray which resulted in Bray being overcharged during the term of the contract. It was at the time of contracting that the price terms were established which would be in effect for 1975-76. Chevron was obligated not to charge a price which exceeded the maximum lawful price under the regulations. The previous contracts had no legal force beyond their expiration. The fact that Chevron had committed the same type of violation in those previous contracts is irrelevant. At the time the 1975-76 contract was agreed upon, Chevron's negotiators specifically considered the price terms of the 1975-76 contract. This is unlike the purely ministerial task of shipping quantities of petroleum according to the terms of the contract found in *Western Mountain.*

A release of future violations is, without question, void against public policy. *Pearlstein v. Scudder & German,* 429 F.2d 1136 (2d Cir. 1970), *cert. denied,* 401 U.S. 1013 (1971); *Oberweis Dairy, Inc. v. Associated Milk Producers, Inc.,* 568 F. Supp. 1096 (N.D. Ill. 1983); *Weinraub v. International Banknote Company, Inc.,* 422 F. Supp. 856 (S.D. N.Y. 1976); *Korn v. Franchard Corp.,* 388 F. Supp. 1326 (S.D. N.Y. 1975). If the release is held to bar Bray's claims for the 1975-76 contract years, it would allow companies to absolve themselves of all future violations by having the purchaser sign a release of a similar past violation. For this reason, I would affirm Judge Holden's decision.

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 2-45

NORTHERN OIL COMPANY, INC.,
BRAY OIL COMPANY, INC.,
NORTHERN TERMINALS, INC., and
DANA S. BRAY,
Plaintiffs-Appellants,

v.

STANDARD OIL COMPANY OF CALIFORNIA
and CHEVRON, U.S.A., INC.,
Defendants-Appellees.

Before HOFFMAN, GIGNOUX, and METZNER, Judges.

ORDER

Upon consideration of the Petition for Rehearing and/or Suggestion for Rehearing En Banc filed by Appellants Northern Oil Company, Inc. et al.,

IT IS HEREBY ORDERED that the Petition for Rehearing is DENIED.

IT IS FURTHER ORDERED that the Suggestion for Rehearing En Banc is DENIED. The mandate is to issue May 1, 1985.

FOR THE COURT:
Donna M. Bold, Clerk

by:
Karen S. Berky
Deputy Clerk

April 24, 1985

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Northern Oil Company, Inc. Bray Oil Company, Inc., Northern Terminals, Inc., and Dana S. Bray	)	Civil Action
v.	)	File No. 78-231
Standard Oil Company of California and Chevron U.S.A., Inc.	)	

MEMORANDUM OF DECISION

I. Motion to Reconsider Effect of Release

Following the close of all the evidence in this cause, on the issues of liability and damages, the defendants Standard Oil Company of California ("SoCal") and Chevron U.S.A., Inc. ("Chevron"), by repetitive requests, ask reconsideration of the court's earlier ruling on the prospective application of the release between the parties dated October 14, 1975. The release was executed contemporaneously with the contract for the supply of middle distillates for the ensuing contract year, May 1, 1975 through June 30, 1976. The target of the defendants' present motion is the court's ruling to the effect that

> The release executed by Bray barred matured claims then accrued; it did not bar claims that might arise from future violations of federal law.

Northern Oil Co. v. Standard Oil Co., No. 78-231,

Memorandum of Decision (D.Vt. filed October 5, 1983),at 22.

One of the reasons advanced in the first motion to reconsider was that the defendants had no opportunity to brief this aspect of the court's decision. The defendants have now had the opportunity to brief the question anew to include two recent decisions of the Temporary Emergency Court of Appeals entered on December 22, 1983.

The court is not persuaded that the mutual releases exchanged on October 14, 1975 foreclosed recovery of damages under Section 210 of the Economic Stabilization Act, 12 U.S.C. sec.1904 note, incorporated by reference in the Emergency Petroleum Allocation Act, 15 U.S.C. sec.754(a)(1). to assign this consequence in futuro,to paraphrase from Judge Waterman's opinion in Pearlstein v. Skudder & German, 429 F.2d 1136 (2d Cir.1970), cert. denied, 401 U.S.1013 (1971), would serve only to legalize the very conduct which the regulations seek to prevent and which suits such as this one serve to discipline.

The court reads nothing in the authorities advanced by the defendants to justify giving the release curative and prospective effect capable of discharging liability for overcharges under a new supply contract that was awaiting performance.

The defendants' most recent request for reconsideration was apparently renewed on the basis of two recent, and as yet unreported, decisions by the Temporary Emergency Court of Appeals: Western Mountain Oil Inc. v. Gulf Oil Corp., No. 9-76, slip.op. (Temp.Emer.Ct.App.December 22, 1983)and Fleetwing Corp. v. Mobil Oil Corp., No. 11-5, slip.op. (Temp.Emer.Ct.App. December 22, 1983). These appeals, as their precedents, Siegel Oil Co. v. Gulf Oil Corp., 701 F.2d 149 (Temp.Emer.Ct.App. 1983), and Shell Oil Co. v. Nelson Oil Co., Inc., 627 F.2d 228 (Temp.Emer.Ct.App.), cert. denied, 449 U.S. 1022 (1980), were concerned with limitation of actions under applicable state statutes of limitation. Each of these authorities rejected the "continuing violation" theory and turned aside the concept that each new supply of product gave rise to a separate cause of action.

Western Mountain was an action to recover for overcharges for product sold under an agreement by Gulf to supply Western Mountain with unbranded gasoline from January 1, 1974 through December 31, 1976. There, as in the present action, the claim against the supplier is for overcharges which resulted "from Gulf placing Western Mountain in an improper class of purchaser and calculating its May 15, 1973 transaction prices based on that improper

classification." The appellate court affirmed the district court's application of the Nevada statute of limitation from the date the cause of action accrued.

> As the district court correctly found, all of the requirements for accrual of appellant's cause of action under the facts of this case had been met on January 1, 1974, the date the overcharging commenced as a result of this misclassification.

Id., slip.op. at 6. Accord, Fleetwing, supra, slip op. at 4.

The defendants translate the text just quoted from Western Mountain to mean that all of Bray's claims based on misclassification accrued when the misclassification occurred in 1973. Application of the release in the fashion that the statute of limitations was applied in the cases cited would release the overcharges derived from the final supply agreement of 1975-76. Since this court's opinion of October 5, 1983 held that the October 14, 1975 release barred matured claims then accrued, the defendants urge that the court's prior holding necessarily barred all plaintiffs' claims for overcharges imposed thereafter.

While the argument has some surface appeal, it ignores the particular language of the 1975 release agreement which carves out three exceptions from its operation and effect. One of these exclusions is

> Obligations undertaken by Chevron and/or Bray arising out of Agreements executed on or after this date in the resolution of past differences.

It seems clear enough to the court that overcharges resulting from a misclassification grounded in fraud which was carried forward to the supply agreement "executed on or after" October 14, 1975 were not extinguished.

While the release purported to compromise any claims of fraud that attended the prior arrangements "as of May 1, 1973 and as of May 1, 1974," it specifically excluded the contract relating to sale and purchase of petroleum products executed on or after the date of the settlement.

For the reasons outlined above, the court confirms its prior ruling that the release exchanged by the parties on October 14, 1975 extinguished past claims, but cannot be applied to foreclose overcharges imposed under the supply agreement for the ensuing contract year. To apply the release prospectively to bar this private action under Section 210 of the Economic Stabilization Act would offend public policy in equivalent degree to that which attends prospective release of a statutory action under the securities and antitrust laws. See Redels, Inc. v. General Electric Co., 498 F.2d 95, 99 (5th Cir.1974) (Releases may not absolve party from liability for future

violations of antitrust laws); Pearlstein v. Skudder & German, supra, 429 F.2d at 1136; Hunt v. Mobil Oil Corp., 410 F. Supp. 10, 27 n. 59 (S.D.N.Y.1975) (Weinfeld, J.), aff'd, 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977) ("An agreement to waive future antitrust violations would be contrary to public policy."); Westmoreland Asbestos Co. v. Johns-Manville Corp., 39 F. Supp. 117, 119 (S.D.N.Y.), aff'd, 136 F.2d 844 (2d Cir. 1943) (Release designed to absolve future violations of federal law would be void as against public policy). In this instance the language of the release against prospective application is in step with sound consideration of public policy.

To give the effect urged by the defendants to the release would undermine a principal objective of the regulatory scheme, which

> ...was to maintain the supplier-purchaser relationships as they existed in 1972-73, prior to the statutory regulation of the petroleum industry.

Mobil Oil Corp., et al. v. Dept. of Energy, et al., Nos. 2-40 and 6-31, slip op. at 5 (Temp. Emer. Ct. App. December 20, 1983).

The court's prior ruling precluding prospective application of the release of October 14, 1975 will stand.

II. The Cost Bank Defense

Since the closing days of the liability phase of this controversy the defendants have stoutly contended that the Bray Companies' entitlement to damages, by way of overcharges under the final contract, are insulated and washed away by unrecouped banked costs, the so-called "cost bank" defense. The defendants advance the argument:

> An overcharge by definition is a price that exceeds the 'maximum allowable price'. 10 C.F.R.sec. 212.83(a)(1). A price to a customer exceeds the maximum allowable price only if that price is greater than the May 15, 1973 base price to that customer's class of purchaser plus the increased costs incurred by the seller since May 15, 1973. 10 C.F.R. sec.212.82.

Defendants' Memorandum in Support of Chevron's Motion to Dismiss, dated December 12, 1983, at 1-2 (emphasis in text).

The regulation last cited provides:

> 'Maximum allowable price' means the weighted average price at which the covered product was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, computed in accordance with the provisions of Section 212.83(a), plus increased product costs and increased non-product costs incurred between the month of measurement and the month of May 1973.

10 C.F.R. sec.212.82.

On the strength of these regulatory provisions, the gist of the argument is that Chevron's unrecouped increased costs, as shown in the cost bank balance for each month between October 1975 and the date middle distillates were decontrolled, satisfied the amounts claimed by the plaintiffs for overcharges. Thus, it is claimed that the price increases charged are offset by the costs which Chevron was entitled to pass through to Bray during the relevant time period. The defendants press the point that since they, as refiners, withheld passing through the increased costs to the plaintiffs, the cost bank balances eliminate the overcharges that are claimed under the 1975-76 supply contract. The overcharge problem that consumed weeks of trial time does not lend itself to such simplistic analysis and easy resolution.

Regulatory Framework

The statutory and regulatory background is well described in Standard Oil Co. v. Department of Energy, 596 F.2d 1029 (Temp.Emer.Ct.App. 1978):

> On August 19, 1973 the CLC [Cost of Living Council] added Subpart L-Petroleum and Petroleum Products- to the Phase IV regulations, which established special rules governing the pricing of petroleum products. The key to this pricing structure was the 'base price', which was defined as the May 15, 1973 selling price plus adjustments for the increased costs of imports and domestic

> crude petroleum above the May 15 price. This definition, which differed substantially from that in the proposed regulations, allowed refiners to pass through their product cost increases on a dollar for dollar basis without being subject to pre-notification requirements or a profit margin rule. As to non-product costs, refiners could make price increases above base price to reflect these costs, but they remained subject to pre-notification and profit margin limitations.
>
> As initially promulgated, the petroleum price regulations did not provide that either product cost increases or non-product increases unrecouped in one month could be carried forward, or 'banked', for use in the pricing equation for establishing prices in a later month.

Id. at 1035 (footnote omitted).

More recently this regulatory background has been reviewed and confirmed in Mobil Oil Corp., et al., v. Dept. of Energy, et al., supra, slip op. at 4-5 and n.2, n.3.

The so-called "cost bank" rule was added to this regulatory structure on September 18, 1973, allowing refiners to carry over, or "bank," unrecovered increased product costs for inclusion in the calculation of base prices in a later month. 38 Fed.Reg. 25686, 25688 (Sept. 14, 1973). Banked costs would be reduced correspondingly whenever a refiner added previously unrecouped costs to its current price. "[T]he banking provisions had given refiners a mechanism with which to smooth out price adjustments over a

period of time." Standard Oil Co. v. Dept. of Energy, supra, 596 F. 2d at 1036.

Because the initial cost bank rule created some confusion, it was amended in November, 1973, to clarify that if the prices charged for a particular product failed to yield sufficient revenues to recoup all the product's cost increases, the refiner could bank the unrecouped costs for use in computing base prices in a subsequent month. 38 Fed.Reg. 30271 (Nov.2, 1973).

The banking provisions were continually amended between 1973 and 1976. For the most part, these amendments are not material to resolution of the issue before the court. Of significance, however, is a September, 1974 amendment that has been referred to as the "equal application" or "deemed recovery" rule. 39 Fed.Reg.32306 (Sept.5, 1974). The rule required refiners to pass through increased product costs uniformly among all classes of purchaser or suffer a cost recovery penalty. Specifically, the largest cost increase passed through to one class was deemed to have been passed through to each of that refiner's other classes of purchaser for purposes of cost bank depletion.

Because the rule was initially promulgated without prior notice and comment in reliance on the "good cause" exception to this procedural requirement, its validity was questioned. On December 20, 1983, the Temporary Emergency Court of Appeals

ruled that the September 5, 1974 promulgation and the December 5, 1974 repromulgation of the deemed recovery rule were procedurally valid. Mobil Oil Corp. et al. v. Dept. of Energy, et al., supra, slip op. at 34, 39.

Other amendments in November, 1974, restricted the amount of banked product costs which could be used to increase the base price in a particular month to ten percent of the total amount of unrecouped increased product costs available for pass through. 39 Fed.Reg. 39259-39261 (Nov.6, 1974). In proposing these amendments, the Federal Energy Administration ("FEA") expressed its concern that the enormous accumulated banks of unrecouped costs of some refiners would not ultimately serve to further the provisions' goals:

> The FEA has also concluded that the banking provisions should be substantially restricted in the future. The intent of the price regulations was never to guarantee into the indefinite future that refiners would be able ultimately to pass through the total amount of their increased product costs, without regard to market conditions. Rather, it was intended only to afford refiners the opportunity to pass through increased product costs on a reasonably current basis.

39 Fed. Reg. 32718, 32724 (Sept. 10, 1974).

Further developments in the cost bank amendments are set forth in the margin.[1]

Discussion

The court returns to defendants' contention that the balance of unrecouped banked costs constitutes a full defense to this private action under Section 210(b) to bar liability for any overcharge violations. They maintain that even applying the deemed recovery penalty, Chevron still has a positive cost bank balance during the period between October, 1975, and the end of price controls on middle distillates.

After careful consideration, the court denies Chevron's motion to dismiss based on the sufficiency of unrecouped costs in the Chevron cost bank to support the price increases to the Bray Companies. The court holds as a matter of law that cost bank credits cannot be used to offset overcharge violations, which were found to exist in the liability phase of this case and which are discussed in subsequent parts of this opinion.

In urging the cost bank defense, the defendants place some reliance on the district court decision in Eastern Airlines, Inc. v. Mobil Oil Corp., 512 F.Supp.1231 (S.D.Fla.1981), rev'd, 677 F.2d 879 (Temp.Emer.Ct.App.1982). It appears that the appellate court did not reach Eastern's challenge to the district court's ruling on the cost bank. Eastern Airlines, Inc. v. Mobil Oil Corp., 677 F.2d 879, 881-82 (Temp.Emer.Ct.App. 1982). And in Pacific Service Stations Co. v. Mobil Oil Corp., 689 F.2d

1055 (Temp.Emer.Ct.App.1982), cited by defendants, the court of appeals reversed the district court's summary judgment holding for Mobil, noting that "appellants appear to concede" that the cost bank would provide a defense to overcharges. Id. at 1065. Neither case squarely held that the district court had been correct in treating the sufficiency of a cost bank as an absolute defense.

The history of the price rules teaches that the "cost bank" implementation was principally designed to assist in restoring competition to make room for traditional market forces "to supplant the rigid price control regulations as the price setting mechanism." The Cost of Living Council was aware from the inception of the price freeze of the need to balance price constraints imposed by the regulations against the compelling need for increased energy sources of supply that would otherwise be curtailed by restricted profit incentives. Standard Oil Co. v. Dept. of Energy, supra, 596 F. 2d at 1036.

The court's search has uncovered no support for the contention of the defendants that the "cost bank" is available as a defense to be retroactively invoked, to excuse or palliate a wrongful classification under the Phase IV regulations. To engage the "cost bank rule" to override the wrongful classification imposed on the Bray Companies would subvert the regulatory purpose "...to maintain the supplier-purchaser

relationship as they existed in 1972-73, prior to the statutory regulation of the petroleum industry." See Mobil Oil Corp., et al. v. Dept. of Energy, et al., supra, slip op. at 5. It would also frustrate the effort to preserve historic differentials between classes. See Eastern Air Lines, Inc. v. Atlantic Richfield Co., No. 74-1207, slip op. at 18 (S.D.Fla. Oct.29, 1982), aff'd, 712 F. 2d 1402 (Temp.Emer.Ct.App. 1983), citing Phillips Petroleum Co., 2 F.E.A.sec.80,599, at 80, 831 (1975).

Recently, the Temporary Emergency Court of Appeals quoted approvingly from an earlier administrative decision in this area in upholding the district judge's finding that ARCO had overcharged Eastern Air Lines when it improperly reallocated banked costs from one products bank to another. Eastern Air Lines, Inc., v. Atlantic Richfield Co., supra, 712 F.2d at 1408. The decision relied on involved Tenneco's challenge to an FEA Remedial Order requiring the refund of over $12 million in gasoline overcharges. Tenneco had asserted that during the relevant period, it had available increased costs in its general refinery products bank which could have been reallocated to justify the price it charged for gasoline. Tenneco Oil Co., 1 D.O.E. (CCH) sec.82,512 at 85,041-85,042 (1977). The FEA stated simply:

> This type of retroactive reallocation of increased costs to offset overrecoveries on a particular covered product has never been permitted under the price regulations.

Id. at 85, 043, as quoted in Eastern Air Lines, Inc., v. Atlantic Richfield Co., supra, 712 F.2d at 1408 (emphasis in original).

The defense asserted by the defendants that the overcharges resulting from the misclassification of the Bray Companies are satisfied by the "favorable" cost bank balances is unavailing.

III. Gasoline Claims

The plaintiffs have asserted three overcharge damage claims related to the gasoline contract that was negotiated during the first part of 1973 and made effective as of May 1, 1973. Those claims concerned credit card imprinter rentals, service station identification sign rentals, and service station painting.

Throughout the many trial days consumed by this controversy and in the proceedings which followed, the subject of gasoline supply arrangements and undertakings was brought into the evidence only peripherally as part of the commercial background of the conflict that has been waged before the court and jury. Gasoline supply and incidental expenses related to that product were not involved in the issues presented in the liability phase; that subject is not

before the court in determining the extent of the plaintiffs' entitlement in the damage aspect of the trial.

As noted in our earlier Memorandum of Decision dated July 27, 1983, "it is only middle distillate pricing that is at issue here." Northern Oil Co. v. Standard Oil Co., No. 78-231, Memorandum of Decision (D.Vt.filed July 27, 1983), at 4. The plaintiffs' gasoline claims are dismissed.

IV. Overcharge Violations

The court's earlier decision of October 5, 1983, following the jury verdicts returned in the trial of the liability phase of this action, confined the question of damages recoverable by the plaintiffs to the overcharges imposed by the defendants for sales of middle distillates under the 1975-76 supply agreement executed on October 14, 1975. The remedy is that provided in Section 21 (b) of Economic Stabilization Act, 12 U.S.C. sec.1904 note. This holding is confirmed by what is written and filed today in response to the defendants' motion to reconsider the court's prior decision concerning the prospective effect of the release given by the plaintiffs when the final supply agreement was signed.

By oral argument of counsel stated in the record at a conference on December 7, 1983, after the jury had been summoned to return for the

damage trial, the parties announced that on the basis of various factual stipulations and concessions reached by counsel, there were no remaining issues for consideration by the jury. Accordingly, the case proceeded to trial by the court sitting without a jury on the factual and legal issues that remained.

Facts

Upon consideration of the agreed facts, the stipulations of counsel and the evidence presented, the court finds the facts which follow.

The plaintiffs' entitlement to damages is restricted to overcharges resulting from purchases of middle distillates from Chevron and SoCal during the period between October 14, 1975 and June 30, 1976.

During this time period, the plaintiffs purchased a total of 16 million gallons of middle distillates from the defendants. This total is derived from total gallons delivered by truck from the Albany-Rensselaer storage facilities to the delivery points indicated below:

a) From Rensselaer, New York to Burlington, Vermont=4.3 million gallons;

b) From Rensselaer to Fort Ann, New York= 3 million gallons; and

c) From Rensselaer direct to customers=8.7 million gallons.

The total of 16 million gallons was shipped by barge from Chevron's plant in Perth Amboy, New Jersey

to Bray Terminals, Inc. at Rensselaer, New York; stored at Rensselaer ("throughput"); and then hauled by truck to plaintiffs' storage terminals at Fort Ann, New York or Burlington, Vermont, or hauled by truck from Rensselaer directly to plaintiffs' customers. The plaintiffs bore the costs of barging, throughput, and trucking to these various destination points.

Transportation costs presented on a cents per gallon basis are as follows:

	Burlington	Fort Ann	Direct to Customers
Barging to Rensselaer	.004760	.004760	.004760
Throughput at Rensselaer	.002500	.002500	.002500
Trucking	.023738	.015000	.005380
TOTAL	.030998	.022260	.013090

Under previous supply agreements prior to the "as of May 1, 1973" contract, plaintiffs were charged the following prices:

a) Albany tank car price of .12950, discounted by .00400 to .12550, for deliveries made at Fort Ann and Rensselaer, New York terminals;

and

b) Burlington tank car price of .14350, discounted by .01100 to .13250, for deliveries from the Burlington, Vermont terminal.

The plaintiffs were receiving product on a delivered basis; the defendants paid the cost of transportation to Burlington, Fort Ann, and Rensselaer, as well as throughput at Rensselaer.

Under the terms of the "as of May 1, 1973" con-

tract, the plaintiffs were charged the F.O.B. New York Harbor Cargo price[2] of .1195. The plaintiffs then paid the cost of transporting the product to the various destinations in the amounts per gallon specified above.

The single most divisive issue during the damage phase of this controversy was the extent of overcharges assessed during the damage period caused by the initial, improper classification of the Bray Companies in 1973. After extensive briefing and oral argument on the differing theories of overcharge calculation, the parties stipulated by an agreement announced in open court on December 13, 1983, that for purposes of the damage phase of this trial,[3] the total excess charges to the Bray Companies resulting from the improper classification, subject to defenses raised by the defendants that have now been disposed of in preceding sections of this memorandum, were in the total amount of $210,000.[4] The necessity for calculating the total overcharges recoverable by the plaintiffs for product delivered subsequent to the release of October 14, 1975 was eliminated.

The parties further stipulated the amounts comprising Chevron's entitlement under the counterclaim against the Bray Companies in the total amount of $1,905,278.20:

a) $786,820.77--the balance unpaid on the promissory note given by Bray to Chevron in October 1975;

b) $555,902.21--the amount unpaid on No. 2 oil purchases made by Bray between March 21, 1976 and April 28, 1976;

c) $472,000.70--the amount unpaid on gasoline purchases made by Bray between March 21, 1976, and April 28, 1976;

d) $86,106.99--the amount unpaid on product purchased by Bray during July and early August of 1976;

e) $2,695.48--credit card charge backs;

f) $492.68--unpaid rentals on credit card imprinters; and

g) $1,259.78--unpaid rentals on service station identification signs.[5]

The defendants have agreed that the plaintiffs are entitled to an allowance for credit card payments in the amount of $99,527.07, to be applied against the unpaid balance on product purchased during the spring and early summer of 1976.[6]

The court finds that after deducting $99,527.07, pursuant to the defendants' concession, the defendants are entitled to recover the sum of $1,805,751.13 from the plaintiffs by way of their counterclaim.

In assessing the amount of the plaintiffs' recovery for overcharges for product sold under the 1975-76 supply agreement, the court confirms the jury's finding in response to Interrogatory No.1, except for application of statutory sanctions discussed in Part V which follows. The jury determined

that the defendant SoCal, through its authorized officers and agents, directed and controlled the acts and participation of the defendant Chevron's representatives in the consummation of the 1975-76 contract and mutual release signed October 14, 1975.

Conclusions

During the relevant period from October 14, 1975 to June 30, 1976, the lawful prices that Chevron and SoCal could charge their customers were regulated by the Phase IV price regulations issued by the Cost of Living Council under the Economic Stabilization Act and, subsequently, by the Mandatory Price and Allocation regulations, 10 C.F.R. Part 212, issued by the Federal Energy Office.

The court concludes that Chevron and SoCal overcharged the Bray Companies, as that term is defined under Section 210(c) of the Economic Stabilization Act:

> the amount by which the consideration for ...the sale of goods...exceeds the applicable ceiling [price] under the [mandatory petroleum price] regulations.

12 U.S.C. sec.1904 note.

The Bray Companies, therefore, are entitled to recovery of overcharge damages from Chevron and SoCal for their purchases of middle distillates during the relevant period at prices exceeding those lawfully permitted.

Chevron and SoCal are refiners as that term is

defined in 10 C.F.R. sec.212.31. As such, they were required to determine the prices for their products in accordance with the refiner price rule set forth in 10 C.F.R. sec.212.83. This rule prohibits the defendants from charging prices higher than the maximum allowable price (also referred to as the "base price"). The maximum allowable price for a refiner's sales of a product was defined as the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus increased product costs and certain non-product costs that were also allowed to be passed on. 10 C.F.R. sec.212.82.

The May 15, 1973 base period date was selected due to the general stability of prices on that date in the petroleum industry when normal, free market conditions prevailed. Eastern Air Lines, Inc. v. Atlantic Richfield Co., supra, slip op. at 8-9 (S.D.Fla. Oct.29, 1982), quoting F.E.A. Ruling 1977-5. This was stressed by Judge Mishler,

> because classes of purchasers are determined and fixed with reference to base period transactions, a period of relatively normal market conditions would permit such classes to reflect normal or 'customary' price differentials between a firm's purchasers.

Id., slip op. at 9.

Since a maximum allowable price could only be determined after a customer was assigned to a class of purchaser, the first step in deciding whether

a customer was overcharged is to determine whether the refiner classified that customer in a proper "class of purchaser." "Class of purchaser" is defined as a group of purchasers to whom the seller has charged a comparable price for comparable property or services pursuant to so-called "customary price differentials" between that customer and other customers.

The class of purchaser designation is critical in the process of determining the allowable charges by a refiner to a given customer. Memorandum of Decision, supra, (D.Vt.filed October 5, 1983), at p. 25. The purpose of the class of purchaser concept was to establish a mechanism for preserving the price distinctions between purchasers that customarily existed before implementation of the price control program. Mobil Oil Corp., et al. v. Dept. of Energy, et al., supra, slip op. at 5; Champlin Petroleum Co., 4 D.O.E. (CCH) sec.80,101 at 80, 520 (1979); Atlantic Richfield Co., 4 D.O.E. (CCH)sec. 80,108 at 80, 582 (1979).

Additional terms must be defined to complete the inquiry into the appropriateness of the defendants' classification of the plaintiffs into the New York harbor barge buyer class of purchaser. The term "customary price differential" was defined as a "price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality or location or type of

purchaser, or a term or condition of sale or delivery." 10 C.F.R. sec.212.31.

A price differential is considered customary, rather than random, if it is shown to be cost-related. "Cost-related" means that the differential reflected some significant cost savings by the seller. Pacific Supply Corp. v. Shell Oil Co., 697 F.2d 1084 (Temp. Emer.Ct.App. 1982); Naph-Sol Refining Co. v. Cities Service Oil Co., supra, 495 F. Supp. at 890; Champlin Petroleum Co., supra, at 80, 522.

Under the regulations, four factors have been identified as important considerations in a seller's price determinations: 1) location of delivery; 2) type of customer; 3) volume of product; and 4) terms and conditions of sale or delivery. 10 C.F.R. sec.212.31. A seller that regularly based its pricing decisions prior to May 15, 1973, on any of those factors was required to give them continuing recognition by establishing separate classes of purchaser on the basis of the appropriate factors. Champlin Petroleum Co., supra, at 80, 523.

The jury's responses to Interrogatory No. 11 in its special verdict established that the differences between the prices charged the Bray Companies and other customers in the New York harbor barge buyer class were the result of an established pricing policy or practice to grant a discount or allowance to the Bray Companies based on location and type of

facilities, volume of product purchased, and terms and conditions of purchase. Additionally, the jury responded that these same factors or characteristics of the Bray Companies resulted in a cost-related differential, because substantial cost savings accrued to Chevron and SoCal in doing business with the Bray Companies rather than some other customer.

The regulations required the defendants to preserve price differentials among purchasers that were customarily utilized by sellers prior to the imposition of price controls. Naph-Sol Refining Co. v.Cities Service Oil Co,, supra, 495 F. Supp. at 890. Preservation of such differentials was accomplished by creation of separate classes of purchaser to reflect customary price differentials among purchasers that were in effect on May 15, 1973. Id. at 898.In Naph-Sol, Judge Fox held that proof of an improper classification is sufficient to establish a triable issue of fact as to damages under Section 210 of the Economic Stabilization Act. Id at 892. It was on this basis that the present case at bar proceeded from the liability phase into the final damage phase.

Based upon the jury's responses to Interrogatory No. 11 cited above, the court finds that the pricing formula that defendants applied to the Bray Companies contained customary price differentials such as to warrant creation of a separate class of purchaser. The evidence adduced at trial plainly established

the unique arrangements of the 1968 supply contract that would have been in effect on May 15, 1973, but for the fraudulent misrepresentation that induced the "as of May 1, 1973" contract.

Once the relevant class of purchaser has been identified, the inquiry into overcharges proceeds to consider "transactions," as that term is defined under the regulations. "Transaction" means an arm's-length sale or lease between unrelated parties and is considered to occur at the time and place when a binding contract is entered into between the parties. The price that is the starting point for computing "maximum allowable prices" for each class of purchaser is the price charged in deliveries to a member of that class that took place on or before May 15, 1973 pursuant to a binding contract. If there were no deliveries, but a binding contract was in effect, the transaction is deemed to occur at the time the contract is entered into. F.E.A. Ruling 1979-1.

Because the court concludes that the relevant class of purchaser is a separate class with the Bray Companies as its only member, the May 15, 1973 weighted average price is to be derived from the 1968 supply agreement then in effect.

Lastly, the defendants urge that the Bray purchasers suffered no increased price changes by the refiners reallocation of transportation

costs from the seller to the buyer by way of the assignment of the Bray Companies from the Albany-Burlington tank car pricing scheme to the New York Harbor formula. The argument is premised on the notion that the prices charged on the Albany and Burlington posted tank car formula included transportation and other marketing costs. Thus, the argument goes, there was no impermissible price increase, but rather a reduction in the price of product since the price at New York Harbor, apart from transport costs, was less than the price at Albany and Burlington after deduction of barging and other marketing costs.

The argument is illusory at best. It is noteworthy that in the letter agreement proposed by Chevron, dated December 26, 1973, wherein the supplier preserved the option of selecting the higher of the prices prevailing under the contract due to expire May 31, 1973 or Chevron's New York Harbor Cargo price "plus all of Chevron's related supply costs to each such location (Albany-Burlington) provided such prices shall in no event exceed the maximum prices for such products permitted under any economic control program then in effect." Pltf. Exhibit 58. Of course, the particular control program that might be in effect after May 31, 1973 was incapable of accurate prediction when the proposal was first made. What was unknown in December

1972, in terms of price controls, became more readily ascertainable after the initial freeze became effective by Executive Order on June 13, 1973. By July 10, 1973, as shown by the SoCal telex to the operating companies of that date, the defendants' forecast of effective price freeze dates was narrowed to May 15 and June 13, 1973. In any event, in terms of these predictions, a contract, retroactive to May 1, 1973, could eliminate the constraint of prices in effect on the May 31, 1973 expiration date and preserve the prices imposed under the New York Harbor Cargo pricing formula. A rollback to June 13, 1973 would present no adverse effect to the supplier.

From the outset, the plaintiffs' case has proceeded on the theory that the maximum allowable price is governed by the price in effect on May 15, 1973 under the prior 1968 supply agreement. The price formula established in that supply agreement was based on discounted Albany and Burlington posted tank car prices. The plaintiffs have maintained consistently and have successfully sustained their burden of proving that a comparison of these earlier prices to those charged under the "as of May 1, 1973" contract established overcharges, as that term is defined under the federal pricing regulations. Accordingly, the court holds that the plaintiffs are entitled to recovery for overcharges,

imposed by the defendants in violation of the applicable regulations. This recovery will be in the amount of $210,000 and is based on deliveries and prices during the relevant time period as computed and agreed by the parties.

V. Statutory Sanctions

At last we turn to the nature and extent of the recovery to be allowed the plaintiffs as a consequence of the overcharges imposed by the defendants. The court has, by prior interlocutory decisions, limited the plaintiffs' entitlement to that available under Section 210 of the Economic Stabilization Act. Memoranda of Decision, supra, (D.Vt. filed October 5, 1983), at p. 34-36, n.17; (D.Vt. filed July 27, 1983), at p. 31. The controlling statutory provision bears repetition:

> (b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:
>
> (1) an amount not more than three times the amount of the overcharge upon which the action is based, or
>
> (2) not less than $100 or more than $1,000;
>
> except that in any case where the defendant establishes that the overcharge was not

> intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonable adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge. . .

12 U.S.C. sec. 1904 note.

The key to the overcharges in this action is the assignment of the Bray Companies by Chevron to the New York Harbor Cargo class of purchasers. In 1964 the Bray Companies were two of Chevron's largest distributors. Dana S. Bray, Sr., was a determined and skilled negotiator during this period when the defendants strived to expand their petroleum market in the northeast. At the time the 1966 supply agreement was consummated, the New York Harbor Cargo formula was Chevron's most advantageous pricing arrangement in terms of realization of profit. Bray demanded and received a better pricing agreement by way of the Albany and Burlington posted tank car prices at the location where Chevron's supplies of middle distillates were delivered. Under the Burlington and Albany tank car price arrangement, Chevron paid the transportation costs to these distribution points. The prices specified in the 1966 supply agreement were further reduced by certain discounts and allowances.

The factual history of the negotiations that followed and concluded in the "as of May 1, 1973" contract is fully reported in earlier decisions of the court. The increasing danger of price control threatened Chevron's resolute determination to remove the pricing advantage which the Bray Companies enjoyed under the prior supply agreements. The plaintiffs' claim that the responsible officers at Chevron anticipated the selection of a base price date during the month of May, 1973, and motivated the false representation by Eric Pfefferkorn, is fully supported by the evidence on this aspect of the case. See Memorandum of Decision, supra, (D. Vt. filed July 27, 1983), at 5-6, n.1. There is no evidence to indicate that the fraudulent statement concerning the justification for the contract change was unintentional or a bona fide error.

In the letter agreement dated December 26, 1972, proposed by Chevron through Eric S. Pfefferkorn, it is at once apparent that the author of the document was entirely mindful that the prior contracts listed as then in effect

> will by their terms expire on May 31, 1973:
>
> Heating Oil Agreements between Chevron and Bray and Northern, respectively, dated as of June 1, 1966, as now operative between us.
>
> . . .

> We have also previously informed you that we do not intend to extend or renew the Contracts after their expiration as aforesaid.

The communication from Chevron recognizes the difficulty that might be encountered should Bray decide to sell his companies or experience the need to procure product from other sources. After reminding Bray that Chevron had no obligation to supply the plaintiffs after May 31, 1973, the letter stated that Chevron would continue "to supply you for such reasonable period beyond May 31, 1973, as you elect, but in no event beyond November 30, 1973. . . ."

Whether supply of product would continue after June 1, 1973 was conditioned on Bray's compliance with various demands. Chevron preserved the option of selecting either the pricing formula based on the Albany -Burlington posted tank car prices then in effect or the New York Harbor Cargo price, whichever was higher. An additional condition dealt with credit terms. The pertinent text of this letter is set forth in the margin.[7] Apparently, the notion of placing all supply contracts on a uniform May first starting date was of no concern to the defendants at the time the December 26, 1972 letter agreement was proposed -- at least no mention was made of a May 1, 1973 effective date.

As the termination date of the 1968 supply agreement drew near, the dangers posed by way of a price freeze and rollback became more threatening. The importance of transactions based on a contractual relationship was the key to the classification process. It appears from cross examination of the defendants' witness, Mr. Melvin Goldstein of the FEA, that the assignment of customers to a particular class could conceivably unlock the price restraints.[8]

It is manifest from the record that the marketing officers at Chevron East were intent on improving the profit margins to be derived from the Bray Companies after the expiration date of the contract in effect during the negotiations for the 1973-74 supply agreement. It is equally clear that while the defendants sought to retain the economic benefits derived from middle distillate markets developed in the northeastern New York and Vermont areas by the Bray enterprises, the officers at Perth Amboy and San Francisco were equally determined to avoid doing so on Bray's terms. As referred to above, when impending regulatory controls threatened to interdict these financial objectives by way of price controls, Chevron's negotiator, Eric Pfefferkorn, resorted to drastic bargaining measures.

On the total evidence presented, the jury by its special verdict in answers to Interrogatory 5, determined that Chevron's representatives, namely through its chief negotiator, knowingly made false statements concerning the reasons for backdating of answers to Interrogatory 6 that the "as of May 1" contract was involuntarily signed by Dana S. Bray, Sr., because his will was overborne by economic pressure exerted by Chevron's representatives.

To be sure, the findings of the jury fell short of constituting economic duress in the legal sense, but that shortage does not cure or condone Chevron's conduct which underlies the overcharges made during the relevant period of time. The court concurs in this aspect of the jury's verdict. Absent any mitigating evidence or explanation from Chevron's principal actor in these events, Eric S. Pfefferkorn, the record affords no room for a conclusion that the mischief practiced in the negotiations was innocent, accidental or the result of a bona fide mistake.

Chevron's awareness of plaintiffs' status as a unique class of purchaser is reflected in the testimony of two Chevron defense witnesses, Richard M. Kaiser and Eric C. Martin. Mr. Kaiser, who was initially responsible for Bray's classification,

testified at his deposition that he did not know of other Chevron customers who were barge buyers and resellers that were priced o the basis of the Albany and Burlington tank car pricing arrangement. Trial transcript, August 3, 1982, at 5; trial transcript, August 5, 1982, at 199. Additionally, Mr. Martin's deposition, read into evidence, references a personal note:

> Bray class of purchaser, relationship between Bray and Chevron. He is in a class by himself.

As the refiner charged with responsibility for classifying its many thousands of purchasers, Chevron was acutely aware of Bray's singular situation. Chevron was bound to know that the polestar to guide the classification process was the contract legally in effect on May 15, 1973. The evidence revealed that the FEA notified Mr. Pfefferkorn that the fact that the 1973-74 supply contract had not been signed until after the base price date was a principal factor in broadening the scope of the Notice of Probable Violation. Memorandum of Decision, supra, (D. Vt. filed July 27, 1983), at 9.

In a letter dated June 22, 1973 from Eric S. Pfefferkorn to R. Case Prime, Bray's attorney, Pfefferkorn stated:

> We have been operating without any agreements since May 1, 1973. This arrangement is causing serious confusion internally in processing barge shipments, payment of invoices, and all other arrangements. It is of primary importance that new contracts be executed at the earliest possible date.

Plaintiffs' Exhibit 994, Letter from William J. Costello, FEA area Manager, to Eric S. Pfefferkorn, quoting letter of June 22, 1973 from Eric S. Pfefferkorn to R. Case Prime, Esq.

The emphasis to this point has been on the acts of defendant Chevron. The court turns at last to the defendant, Standard Oil Company of California, which stands in a different posture. At the outset of the responses in the special verdict returned in the liability phase of this controversy, the jury determined that SoCal, through its officers, directed and controlled Chevron's representatives in the consummation of the 1973-74 contract. It is on this basis that overcharges, which have been discussed in the previous section, are assessed against SoCal.

The relationship of parent company to wholly-owned subsidiary, standing alone, however, cannot form the predicate for the assessment of additional sanctions against SoCal beyond the overcharges already discussed. Absent proof of direct partic-

ipation by SoCal in the fraudulent misrepresentation by Chevron's marketing representative, the separate identities of Chevron and SoCal warrant particularized treatment. Nor does the involvement of SoCal officials in the contract negotiations with the Bray Companies establish the requisite willfulness.

The jury's special verdicts determined that the wrongdoing in this case was grounded in the fraudulent misrepresentation concerning the reason for the backdating of the "as of May 1, 1973" contract. There is no evidentiary link to connect the wrongdoing of Chevron's chief negotiator to the parent company, SoCal. The evidence is to the contrary.

The court is satisfied that the defendants have met their burden of establishing that SoCal was removed and insulated from the wrongdoing that was found to exist in this case. On December 19, 1983, Mr. George J. Wyllie, of Chevron U.S.A. in San Francisco, testified that in the first instance, classification and base price determinations were made by the pricing coordinator in the operating company.[9] Additional corroboration is provided by the testimony of Mr. Richard M. Kaiser, Chevron U.S.A. regional representative, to the effect that he was the only one involved in making the initial decision that Bray should be put into a particular class.[10]

In sum, the reviewing officers in San Francisco rather blindly followed the classification done by the operating companies, and woodenly applied the latter of the contract documents without looking for misfeasance at Perth Amboy. Nonetheless, SoCal did maintain elaborate administrative procedures to avoid overcharges. The network of screening mechanisms was insufficient, however, to screen out deceptive or coercive conduct in the bargaining process. And, of course, the complex regulatory framework, coupled with the thicket of facts that composes the background of this controversy, made the detection of the wrongdoing more difficult.

Conclusions

The parties agree as to the applicable law. Section 210(b) of the Economic Stabilization Act permits the imposition of attorneys' fees and penalty damages of up to three times the amount of the overcharges for willful conduct, except where the defendant establishes that the overcharge was not intentional but rather resulted from a bona fide error notwithstanding the maintenance of procedures reasonable adapted to the avoidance of such error.

Both parties cite Eastern Air Lines, Inc. v. Atlantic Richfield Co., 712 F.2d 1402 (Temp. Emer.

Ct. App. 1983), in pressing their positions with respect to the imposition of additional sanctions. This recent opinion by the Temporary Emergency Court of Appeals provides guidance for district court determinations on the award of penalty damages under Section 210.

After examining the Economic Stabilization Act's legislative history, the court assigned the burden of proof to the seller who imposed the overcharges:

> [T]o deprive the court of its discretionary power to award treble damages and attorney's fees, the defendant making the overcharge must prove that (1) the overcharge was not intentional, and (2) the overcharge resulted from a bona fide error notwithstanding (3) the maintenance by the defendant of procedures reasonably adapted to the avoidance of such error.
>
> In the absence of such proof by the defendant the court in its discretion may award treble damages and attorney's fees if it finds the overcharge was intentional or resulted from reprehensible or criminal conduct, or lack of procedures reasonably adapted to the avoidance of erroneous overcharges, or bad faith, or where required by equity and the ends of justice.

Id. at 1412. The court then affirmed the denial of penalty damages based upon the district court's finding that the defendant ARCO had proved that the over-

charges were unintentional and that ARCO had acted in good faith and maintained procedures reasonably adapted to the avoidance of overcharges. Id.

In measuring the standard of proof required for the imposition of statutory sanctions, the appellate court has held that recovery of treble damages for violation of petroleum pricing regulations requires more demanding proof of additional elements than that for an award of conpensatory relief. See, e.g., Ashland Oil Co. v. Union Oil Co., 567 F.2d 984, 990 (Temp. Emer, Ct. App.), cert. denied, 435 U.S. 927 (1977).

It was held in Longview Refining Co. v. Shore, 554 F.2d 1006 (Temp. Emer. Ct. App.), cert. denied, 434 U.S. 836 (1977).

> [T]o establish a willful overcharge there must be an intentional violation of a known legal duty, that is to say, to be willful an overcharge must have been made with the specific intention of charging a price which the defendant knew was in excess of the ceiling price allowable under the applicable pricing law and regulations.
>
> ***
>
> [T]here must be clear and convincing proof that an overcharge was willful when a claim for the amount of the overcharge was not presented to the defendant prior to bringing an action for the overcharge.

Id. at 1014. Additionally, the court held that negligence is insufficient to establish a violation. Id.

The plaintiffs' reliance on Naph-Sol Refining Co. v. Cities Service Oil Co., supra, is well placed. In that case, an independent petroleum marketer sued Cities Service Oil Company for treble damages and attorneys' fees arising from alleged gasoline sale overcharges that exceeded the Department of Energy's mandatory petroleum price regulations. In denying the defendant's summary judgment motion, the court concluded that there was sufficient evidence to enable the trier of fact to conclude that Cities' conduct was intentional and did not result from "a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error." Id. at 902.[11]

Here the justification for the award of additional statutory sanctions resides primarily in the overcharges imposed after the exchange of mutual releases in October, 1975. Yet, the underpinning of these overcharges is entrenched in the deceptive and wrongful conduct on the part of Chevron's Pfefferkorn who, according to the jury's verdict, induced the retroactive effective date of the "as of May 1, 1973" contract.

The evidence is clear and convincing that by this device Chevron was striving for financial gains that otherwise could be stifled if the 1968 contract became the basis for calculation of the maximum allowable price under the federal pricing regulations. The proof leads to the conclusion that Chevron's marketing representative acted with the specific intention of inducing a change in contract terms to a pricing formula that exceeded the ceiling price defined in the applicable regulations prevailing during the relevant time period.

SoCal, on the other hand, although eagerly engaged in the pursuit of increased profit realization, did not participate in the wrongful misrepresentation on the part of Chevron's marketing representative. SoCal's fault lies in its failure to probe into the deceptive foundation upon which Chevron's classi-cation was based.

Reliance on the teaching of Eastern Air Lines, Inc. v. Atlantic Richfield Co., supra, 712 F.2d at 1410-1412, and Longview Refining Co. v. Shore, supra, 554 F.2d at 1012-1014, leads the court to hold that, on the evidence presented, the plaintiffs are entitled to recover the amount of $210,000 from the defendants for overcharges. An additional $210,000 for willful imposition of overcharges will be assessed by way of statutory

sanctions against defendant Chevron U.S.A., Inc., alone, bringing the plaintiffs' recovery to $420,000.

Additionally, the court will make an apportionment of reasonable attorneys' fees at one-half of the total expense incurred by the plaintiffs. In making this adjustment, the court is guided by Hensley et al. v. Eckerhart et al., ___ U.S. ___, 103 S.Ct. 1933 (1983), which clarified the principles for the exercise of the court's discretion in awarding attorney's fees. In Hensley, the Supreme Court declared that a prevailing plaintiff's "degree of success" is the "most critical factor" to be weighed by the district court in determining a reasonable attorney's fee. 103 S.Ct. at 1941. The Court explained that "[i]f . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." Id. The court concluded that "[a] reduced fee is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." Id., 103 S.Ct. at 1943. Hence, the district court may reduce the fee award below the lodestar figure by either identifying "specific hours that should be eliminated," or by merely deducting a fixed amount or percentage from the lodestar "to account for the limited success." Id., 103 S.Ct. at 1941.

Applying these principles to the case at bar, the court concludes that a one-half reduction of total fees fairly represents plaintiffs' success on the merits, while precluding recovery of litigation costs on issues on which the defendants prevailed. More specifically, the apportionment is based on the plaintiffs' failure to prevail on the issues of rescission of the mutual release of October 14, 1975, and on the Green Mountain Petroleum transaction, which justified the change in credit terms in the 1974-75 supply agreement.

Against these recoveries by the plaintiffs, the defendant Chevron is entitled to recover the amount of $1,805,751.13 from the plaintiffs on its counterclaim, as reduced according to stipulation by the parties.

The clerk is directed to enter judgment on the special verdict of the jury, the court's earlier decisions of July 27 and October 5, 1983, and the findings of fact and conclusions of law stated and considered herein.

Rule 58 of the Federal Rules of Civil Procedure directs that "[e]ntry of the judgment shall not be delayed for the taxing of costs."[12] Accordingly, the clerk will enter final judgment in accordance with the views and amounts stated in this decision

without awaiting allowance of costs, including attorneys' fees. This issue will be determined in separate, supplemental proceedings to follow.

It is so ORDERED.

Dated at Rutland, in the District of Vermont, this 17th day of February, 1984.

James S. Holden
United States Senior District Judge

FOOTNOTES

1 On November 29, 1974, the FEA issued further amendments to the petroleum pricing regulations . . . [I]t for the first time adopted an explicit rule that increased non-product costs not recouped in the current month could not be carried forward for use in computing allowable prices in excess of base prices in any subsequent month. $212.83(e)(4); 39 Fed. Reg. at 42372. These amendments took effect on January 1, 1975.

Standard Oil Co. v. Dept. of Energy, supra, 596 F.2d at 1037.

2 Throughout the course of this litigation, New York Harbor Cargo class has been variously referred to as New York Harbor Barge Buyer class.

3 The parties' stipulation concerning calculation of overcharges in the agreed amount of $210,000 does not extend to any subsequent proceedings that may be directed upon appellate review of these proceedings.

4 Northern Oil Co. v. Standard Oil Co., No. 78-231, D.Vt., Partial Transcript of Damages Hearing, December 13, 1983, at 2-3.

5 Defendants' Proposed Order on Rule 16 Conference at 9, Northern Oil Co. v. Standard Oil Co., No. 78-231, D.Vt., filed December 7, 1983.

6 Id. at 10.

7

> Accordingly, although Chevron has no obligation to do so Chevron hereby agrees that, if you signify your desire as hereinafter provided for us to supply you for such reasonable period beyond May 31, 1973, we are willing to do so under the following terms and conditions.
>
> ***
>
> B) We shall supply you with up to, but not in excess of, 70,000 barrels per month of No. 2 heating fuel and up to, but not in excess of, 7,000 barrels per month of kerosene, but not to exceed in the aggregate 400,000 barrels of both products delivered to all locations under said Contracts (which phrase shall be deemed to include deliveries to Fort Anne, New York and Burlington, Vermont, as well as deliveries

EDITOR'S NOTE

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of any products hereunder into tank trucks at Rensselaer, New York under the aforesaid letters of authorization) under the provisions thereof, excepting those provisions relating to the prices for such products, which shall be as set forth below and except as herein otherwise provided.'

The price to you for such No. 2 heating fuel and kerosene as you may elect to purchase under the provisions of this Letter Agreement, including (1) any portion of said quantities delivered by water transport to you on or after the opening of the New York State Barge Canal to navigation and (2) any product lost or contaminated at Rensselaer, New York shall for each location be the higher of the following:

1) The price formulae as set forth in said Contracts, or

2) Chevron's posted New York Harbor Cargo price for such products in effect on date of delivery plus all of Chevron's related supply costs to each such location, provided that such prices shall in no event exceed the maximum prices for such products permitted under any economic controls program then in effect.

***

D) The extension of the period of said Contracts as herein provided is contingent upon (a) your accounts being current within the credit terms of said Contracts on May 31, 1973 and (b) your obligations under those

certain bank loan agreements as to which Chevron is guarantor being current on May 31, 1973.

***

If you desire a continued supply of products under terms and conditions hereinabove set forth, please confirm the same in the space provided below and return the carbon copy to us by January 31, 1973.

Very truly yours,

CHEVRON OIL COMPANY

By /s/ E. S. Pfefferkorn
E. S. Pfefferkorn

Confirmed:

BRAY OIL COMPANY, INC. BRAY TERMINALS

By _____ By _____

NORTHERN OIL COMPANY, Inc.

By _____ _____
DANA S. BRAY

Plaintiffs' Exhibit 58, December 26, 1972, letter from Chevron to Bray Companies.

8 See generally testimony of Melvin Goldstein, December 14, 1982 trial transcript.

9 Testimony of George Wyllie, December 19, 1983 trial transcript, at 29, 34.

10 Kaiser deposition read into evidence:

> Q. So, you were the only one involved in making the decision that Bray should be put into a particular class?
>
> A. That's correct.
>
> Q. By anyone, I meant anyone at Perth Amboy in that last question. Is your answer still the same?
>
> A. Yes.
>
> Q. Was there anyone in San Francisco in 1971 who was involved in the decision with respect to what class of purchaser Bray should be placed in?
>
> A. I don't think it was even discussed with them. We're now referring to 1971?
>
> Q. Correct.
>
> A. Yes.

August 3, 1982 trial transcript, at 27.

11 Such evidence included the following:

> (i) Cities refused to continue the historic pricing similarity among Naph-Sol, Osceola and Tulsa, reflected in Cities, customer codes, revised recently before the Regulations were promulgated.
>
> (ii) Cities refused to preserve customary price differentials between Naph-Sol and 'branded distributors.'

(iii) Cities placed Naph-Sol in a legally spurious class of purchaser known as 'unbranded resellers-non-contract.'

(iv) Cities uses fictitious transactions in the Northeast and the South to determine its prices to Naph-Sol in the Upper Mid-west.

(v) After the close of discovery in this case, and when faced with Naph-Sol's motion for partial summary judgment, Cities attempted to rearrange its classes of purchaser so as to wipe out the 'Osceola' and 'Tulsa' classes, in which Naph-Sol contended it belonged.

(vi) As part of this scheme, Cities attempted to structure its classes of purchaser in such a manner as to conceal the fact that on or immediately before May 15, 1973, both Osceola and Tulsa were charged lower prices than were branded distributors.

(vii) As a further part of this scheme, Cities attempted to charge Naph-Sol the same prices that Cities charged to substantially dissimilar customers.

(viii) Cities attempted to obtain DOE's approval of a class of purchaser scheme which would ratify Cities' pricing basis with respect to Naph-Sol.

Naph-Sol Refining Co. v. Cities Service Oil Co., supra, 495 F. Supp. at 902-903.

12 For cases construing this provision of Fed. R. Civ. P. 58, see Richards v. Gov't of the Virgin Islands, 579 F.2d 830, 833 (3d Cir. 1978) ("Costs" construed to include counsel fees); Danzig v. Virgin Isle Hotel, Inc., 278 F.2d 580, 582 (3d Cir. 1960) ("The postponement of judgment until after the amount of costs can be determined is contrary to the letter and purpose of Rule 58."); and Maryland and Casualty Co. v. Jacobson, 37 F.R.D. 427, 430 (W.D. Mo. 1965) ("It is clear, however, that the Rules of Civil Procedure now expressly recognize that the entry of a judgment and the taxation of costs are entirely separate legal acts.")

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Northern Oil Company, Inc.) Bray Oil Company, Inc.,) Northern Terminals, Inc.,) and Dana S. Bray)		
		Civil Action
v.)		
)		File No. 78-231
Standard Oil Company of) California and Chevron,) U.S.A., Inc.)		

MEMORANDUM OF DECISION

The second wave of the defendants' assault on the special verdicts of the jury on the liability phase of this action is directed to three principal questions:

1. Special Verdict 5. Is the jury's finding of fraud in the 1973-74 contract supported by clear and convincing evidence?
2. Special Verdict 11. Did the price distinctions in effect between Bray Oil and other Chevron purchasers on the freeze date of May 15, 1973, constitute customary price differentials of a character that required Bray Oil to be classified in its own particular class of purchaser?

3. Special Verdict 2. Does the evidence of fraud justify rescission of the release executed by Dana S. Bray, acting individually and in behalf of the Bray companies, on October 14, 1975?

Since the answers provided by the jury in Special Verdict 2 affect the disposition of the claims arising under prior contracts, the court will consider the 1975 release first.

The 1975 Release

The court turns first to the text of the release. It provides:

> IT IS AGREED by and between Chevron and Bray that Chevron hereby releases Bray and Bray hereby releases Chevron and each of them hereby releases each of their respective parent corporations, if any, affiliates, successors and assigns, servants, agents and employees, from and against any and all loss, cost, claims, damages, liabilities, actions, and causes of action which each may have or which each may allege to have had against the other arising out of actions, agreements, contracts, commitments, relationships or action taken or omitted to be taken up to the date hereof based in tort, contract, negligence, anti-trust or violation of State or Federal Regulations excluding, however, the following:
>
> A) Payments under Agreements existing immediately prior to the execution hereof with respect to the sale of products referred to therein, payment for which is not to be made prior to the effective date hereof and which have not otherwise been resolved as between Chevron and Bray,

B) Obligations undertaken by Bray and its affiliates, or any one or more of them, with respect to financing loans, through banks, the re-payment of which loans Chevron has guaranteed at the request of Bray and its affiliates, or any one of them, and

C) Obligations undertaken by Chevron and/or Bray arising out of Agreements executed on or after this date in the resolution of past differences.

Bray, by its execution hereof, acknowledges the validity of certain arrangements entered into between it and Chevron dated as of May 1, 1973 and as of May 1, 1974 relating to the purchase and sale of petroleum products.

Bray further acknowledges that it shall file no claim, complaint or charge for its own intended benefit, or that of others, nor be entitled to retain the benefit of the disposition of a claim, complaint or charge filed by any other party with the Federal Energy Administration involving Chevron's allocation and pricing practices towards Bray under Acts or Regulations relative to Federal Price Control and Allocation Regulations presently within the jurisdiction of the Federal Energy Administration.

The evidence which underlies the answers given by the jury on the mutual releases relate to two principal misrepresentations made by Chevron's manager of wholesale distribution, Eric S. Pfefferkorn, to plaintiff Dana S. Bray. First is a letter of August 28, 1975 (Pltfs' E. 1015) which includes the representation:

> We believe you are familiar with FEA's NOPV of October 25, 1974, directed to Chevron, but you may not be aware that FEA has formally rescinded their NOPV as of that date.[1]

Mr. Bray testified that the letter was followed a few days later by a telephone call from Mr. Pfefferkorn in which he stated in substance that the FEA had found Chevron innocent of any wrongdoing in the handling of the Bray account.

Both statements were made in the course of hard bargaining negotiations by the parties for a new contract for the supply of middle distillates by Chevron to the Bray Companies for the ensuing heating season during the winter of 1975-76. There is adequate evidence in the record to support the jury's finding that the statements in combination were false, knowingly made and advanced to influence the negotiations favorably to Chevron's bargaining position. There is no contradiction in the evidence that the NOPV was rescinded to enlarge the scope of the subject matter of the investigation by the FEA from a complaint that Chevron unlawfully imposed more stringent credit terms on the Bray companies to an expanded investigation to reach alleged unlawful pricing by Chevron in product sold to Bray under the 1973-74 contract.[2]

As the Pfefferkorn letter suggested, Mr. Bray was familiar with the NOPV. After Bray's transaction with the Green Mountain Petroleum Company, involving a violation of Bray's consignment arrangement, Chevron imposed a fixed schedule of payments in lieu of consignment. As a result, Bray imposed more severe credit terms on his retailers, including Henry Caswell, who was Bray's son-in-law. Mr. Bray explained that as a consequence of Chevron's credit demands, he had to restrict Caswell's credit conditions to meet the requirements of the 1974-75 supply agreement.

Mr. Bray testified that thereafter Caswell, Bray and Mr. Bray's attorney, Donald E. O'Brien, Esquire, met with Mr. J. D. Salmon of the Federal Energy Administration at Burlington on October 8, 1974. As a result of this conference, Bray instructed the assistant treasurer of Northern Oil to write the FEA. The NOPV to Chevron followed on October 25.

The record makes it clear beyond dispute that the NOPV was a critical factor in the negotiations that were pursued during the pendency of the federal investigation; both sides of the controversy were mindful of its potential impact. Bray testified he fully expected the FEA would roll the prices back to those in effect on the May 15, 1973 freeze date under the earlier agreement that was not due to expire

until May 31, 1973. The administrative investigation was discussed by Bray and Chevron officials at a meeting in Boston with FEA representative, Mr. Hagen. Bray's counsel urged Mr. Hagen to proceed apace with the inquiry. At a negotiating session in Perth Amboy, New Jersey, on May 14, 1975, the classification of the Bray companies by Chevron was under discussion. Both parties expressed common concern about the delay which attended the investigation. The position taken by FEA that they would take no further action concerning classification and pricing under the 1973-74 contract unless Bray submitted a formal complaint was referred to. This evidence is derived from Mr. O'Brien's testimony that shortly before the meeting, he and Mr. Costello, the FEA investigator, had met at Burlington on May 1, 1975. Mr. O'Brien's handwritten notes of this conference report "FEA will not act on May 1, 1973 or '74 contract without a formal complaint setting forth all the facts." The witness elaborated further:

> Everybody knew at that time that FEA, since it had asked for information related to both contract years, '73 and '74, that that was what they were looking at, and we were going to get a decision about it, so the dispute between the parties as to which contracts were in effect, that would be a matter of resolution by the FEA. (Tr. 7671).

Mr. O'Brien further explained that he was referring to the "validity of the May 1, '73 and '74 contracts with reference to compliance with the federal regulations." Further, during the course of the negotiating session at Perth Amboy, the Bray representative, reiterated FEA's position that the agency "would take no action pending receipt of a formal complaint from us (the Bray companies) with respect to both the 1973 and 1974 contracts, and we stated we were unwilling to file a formal complaint until it appeared that there was - there was no other available alternative to use except take an action." [sic]

In addition to the consideration of the FEA investigation, the opposing claims of the parties were the subject of extended negotiations. Mr. Bray advanced a laundry list of fourteen specific claims. Chevron apparently was concerned with the past due account of the Bray companies in the amount of several million dollars, insisting that the prior contract effective May 1, 1973 did not violate the federal energy regulations. The May meeting concluded with Chevron pointing out that the pricing and credit had to be resolved at the headquarters in San Francisco, hopefully by June 1, 1975.

Following the meeting extensive communication between counsel for Bray and Chevron continued. Both attorneys shared mutual concern and consternation that the results of FEA investigation had not been reached. Both attorneys were in communication with Mr. Costello of the FEA after he recommended that the Bray companies file a formal complaint. O'Brien testified that he entertained some optimism that consideration of the Bray "laundry list" by Chevron's parent company in San Francisco would be productive and he was opposed to interfering with the prospect of reaching an agreement by filing a formal complaint with FEA. Both attorneys shared the view that if no supply agreement was reached for the ensuing years, the only alternatives were resolution by the FEA or litigation. Counsel on both sides of the controversy were persuaded that decision by the FEA was crucial.

During further telephone conversations between counsel for the parties, it is clear that representatives of both sides had been in contact with the FEA. In any event, a further negotiating session at Perth Amboy was scheduled for July 8, 1975. At that meeting the NOPV was again the subject of discussion. Mr. O'Brien testified "that is the first time I believe I saw the NOPV."[3] According to Mr. O'Brien's testimony, the Chevron representatives

> expressed uncertainty as to whether or not the NOPV extended to both contract years, May 1, '73 and May 1, '74 and I had not seen it and I expressed that fact and was given a copy of it, I think at the end of the meeting.

The uncertainty on either side, except for bargaining purposes, is doubtful. The NOPV, which is shown in the margin,[4] is clear enough; it refers only to the modifications of credit terms that were imposed May 1, 1974, from those that prevailed under the prior contract and modifications of the discount on sales of product subsequent to May 1, 1974.

Moreover, on May 2, 1975, the FEA area manager, Mr. Costello, in keeping Chevron "abreast of the status of our investigation of the Notice of Probable Violation issued to Chevron Oil Company on October 25, 1974" informed Mr. Pfefferkorn that the Bray interests "had advised me (Costello) that they intended to file in the near future a formal complaint to the Federal Energy Administration concerning changes in business practices - including credit terms - from those in effect in May 1973."[5] And in a communication of July 15th, soon after the July 8, 1975 meeting, Pfefferkorn specifically referred to the FEA "advice of May 2, 1975 that you intended to file a formal complaint concerning claimed changes in business practices back to May 1973." (Plaintiffs' Exhibit 988C).

The letter reaffirms Chevron's position that the current balance of Bray accounts was $3,863,996.73, and pending payment of the past due amount, Chevron would continue to supply middle distillates on a cash before delivery basis.

In the interim, on July 9th the day after the second Perth Amboy meeting, Mr. Bray had written Mr. Pfefferforn indicating he would give up "our claim against Chevron for the past two years - and pay them (Chevron) $3,000,000 in full settlement - not later than August 1, 1975. It is mutually agreed that Chevron and Bray will terminate any civil action against each other as well as dropping all complaints to FEA and causing them to discontinue their claim."

In mailing payment of $181,125.00 for purchase of No. 2 fuel oil, by letter of July 15, 1975, Mr. Bray wrote Chevron:

> In view of the present situation between my companies and Chevron Oil Co. with reference to FEA, contracts for the past two years, claims between us, and future contract negotiations we want it clearly understood that this purchase will not be considered a waiver of any of our rights or claims in the above matters.
>
> We treat this purchase as an independent transaction and not affecting our rights and claims in the above matters. Including in our claims are pre-May 15, 1973 price differentials, discounts, allowances, etc. which relate to the F.O.B. price of this transaction. By entering into this transaction we reserve all of our rights and claims and waive none. [sic]

Prior to the receipt of Chevron's letter of July 15th, Dana Bray undertook consultation with a New York attorney Borenkind, who was considered to be expert in the area of federal energy regulations. A copy of the NOPV was provided. Mr. Bray submitted the background of the negotiations, including the Green Mountain Petroleum affair and the FEA position that "they would require a formal complaint before reviewing the May 1, 1973 contract."[6]

On July 24, 1975, Mr. Costello of FEA wrote Mr. Pfefferkorn, informing him of the rescission of the original NOPV in order to broaden the scope of the investigation. A month later Pfefferkorn wrote Bray of the rescission of the NOPV. As indicated earlier, this letter constitutes the primary basis for the plaintiffs' claim of fraud in the releases of October 14, 1975.

As the winter season approached and with the supply agreement for heating oil during that period not resolved, Chevron communicated with the energy offices of Vermont and New York. A special meeting was arranged at Albany on September 17, 1975. The meeting was attended by a delegation from the Bray and Chevron companies, state energy officials, and FEA attorneys Webster and LaVine.

The main object of the meeting was to remedy the impending danger of an acute shortage of heating oil for the winter of 1975-76, threatened by the deadlocked Bray-Chevron negotiations. The conference centered on the debt for past supplies owing from Bray to Chevron and Chevron's demand for a general release as a condition of continuing supply of product. The FEA representative reported that a general release between the parties would not absolve the parties nor bind the agency from government prosection for such violations. The Green Mountain Petroleum transaction surfaced as a problem and was the subject of a discussion between Mr. O'Brien and Mr. Webster of the FEA. O'Brien found the FEA attorneys quite sympathetic. When Webster expressed surprise that Chevron had not sued to recover the debt, O'Brien pointed out that Chevron could easily have done so, but had taken no steps in this direction.[7]

The Bray people left the meeting with the impression that Chevron was acutely sensitive to the effect withholding of supply would have on the Chevron public image. As to this, O'Brien testified:

> I felt that Chevron was going to react very, very strongly to what I felt was a concern for their public image as it had sort of come out of that meeting, and that we would make some progress on getting some supply. I felt that they were

> really very concerned about the image, that they felt the onus or lack of supply would be put squarely on their shoulders rather than on the Bray companies, and they had reacted quickly in the sense that this was the 17th, and they are going to get back to a proposal to the Bray companies by the 19th.

In any event, the Albany meeting generated a feeling of optimism. Mr. O'Brien noted in a written summary of the meeting:

> It seems to me that there were sufficient pressures brought to bear at this meeting to virtually force Chevron to make an acceptable arrangement. Undoubtedly, they will want to limit the arrangement to this time, but I feel quite confident that they will supply the product.[8]

On September 24th arrangements were made for a further negotiating meeting in Burlington, Vermont on October 1, 1975. The bargaining resumed on that date and continued through October 2nd. Counsel for both parties were present throughout.

The meeting was held in Mr. O'Brien's office. Chevron's concern centered on the problem of future supply to the Bray companies, promissory notes to cover past debt and exchange of mutual releases. Bray expressed his view that the schedule of payments proposed for the past debt was too restricted, - one he couldn't live with. Bray opposed the release. The negotiation came to an impasse on these points. Bray's attorney suggested a break. During that

interval Mr. Bray and his attorney discussed the effect of the proposed release on future litigation or complaint to the FEA. O'Brien's opinion was solicited concerning the possible success of such proceedings. Apparently in the urgency of the need for such proceedings. Apparently in the urgency of the need for critical supply, Bray concluded his attorney could not give him the assurance of success that he looked for. After full review of the entire situation and a thorough canvass of the options available at that time. Mr. O'Brien testified:

> He [Bray] decided that he had no choice and there was no alternative except to sign the release in order to get the product up and available for the on-coming heating season.

The decision was reached after some two hours of deliberation. This decision broke the impasses and the meeting was resumed.

The energy officials of the States of New York and Vermont, who attended the meeting as interested observers, departed from the scene upon learning that the deadlock had been broken. The contract conference continued over the rest of the day, October 1st, and into October 2nd. During this time the final terms and conditions of the 1975-76 contract were negotiated and resolved. Counsel for the parties prepared and submitted the contract documents which were executed by the parties during the next two weeks.

The final agreement was not a total victory or total defeat for either of the contestants. Prior to October 14, 1975, Bray received Chevron product on a cash before delivery basis; the contract provided for 1% discount in 10 days - 30 days net on withdrawal from Bray terminals in Rensselaer, New York. Prior to the signing Chevron demanded full payment of Bray's account; the contract provided for payment by a series of promissory notes with final payment in January 1976, subsequently extended to April 1976. In July 1975 Chevron claimed Bray's overdue obligations were in the amount of $3,863,996.73. At that time Bray offered to pay $3,000,000. Chevron apparently had acquiesced to this offer by the time of the October 1 session. Chevron then asked 9% interest on its reduced claim of past due obligations of $2,949,206. The promissory notes that were part of the 1975-76 contract were without interest. Chevron relinquished past charges for interest. Chevron claimed interest on the past debt that had accrued prior to the date of the 1975-76 contract. Interest was also claimed by Chevron on the money received from the Green Mountain Petroleum Co. payments made to Bray during the 1973-74 contract year. In the final agreement all obligations were guaranteed by Dana S. Bray individually and by all of the Bray companies.

Chevron continued to supply the Bray companies under the 1975-76 contract through the rest of the contract year. In January 1976 the Bray companies had paid $1,300,000 on the promissory notes of October 1975, leaving a balance of $1,600,000, with the last payment due April 10, 1976. At Bray's request, the schedule of payments was revised with final payment due April 30, 1976.

Payments were made on the promissory note and on product supplied under the new contract. However, despite the modified schedule, on April 15, 1976, four payments were past due, totalling $870,000 in arrears. Barging and ice charges were delinquent in the amount of $29,208.05. Chevron demanded payment for the amounts due within seven days. The demands were not met, although two payments of $200,000 were made in May and June.

Previously, in January 1976, Mr. Bray had undertaken efforts to sell his interests in the plaintiff companies. After unsuccessful attempts to resolve the credit problems with Chevron, Bray eventually sold the middle distillates and gasoline interests to third parties.

In the meantime the FEA investigation undertaken in Regions I and II on the east coast was transferred to Region IX at San Francisco. Standard Oil of California was requested December 5, 1975 to respond to a

financial impact statement concerning the effect of the changes in the 1973-74 contract. Mr. George Wyllie of Standard Oil obtained a copy of the release which he submitted to an FEA investigator McConnell. Despite the agency's prior indication that the release would not affect investigations of violations of the federal regulations, McConnell informed Wyllie that the FEA would accept the release in satisfaction of the agency's request for information concerning the impact of the 1973-74 contract.

Mr. O'Brien testified that he and Mr. Bray later found out that the release was the basis for the termination of the FEA investigation. The information was disclosed at a meeting attended by Bray, O'Brien and other Bray employees at the office of the federal agency in Boston in March 1977. Prior to that meeting, in August 1976 Chevron instituted litigation in the Vermont Superior Court on the promissory notes and other amounts claimed due from the Bray companies. The state litigation was stayed by the state court after this action was commenced. The claim of fraud was first advanced by Mr. Bray and his companies in the answer and counterclaim filed in the state action.

This review of the evidence concerning the release is gathered principally from testimony of Mr. Bray and his attorney O'Brien and the documents they prepared concerning the negotiations before and after the mutual release of October 14, 1975. The question which confronts the court is whether this fabric of the proof is of sufficient substance to sustain the jury's answer to the question submitted on the issue of fraud in the mutual release of October 14, 1975.

Discussion

The discussion of the law to be applied to the jury's verdicts must start with the established rule that questions relating to the validity of purported releases of federal statutory causes of action is governed by federal law. Dice v. Akron, Canton & Youngstown Railroad Co., 342 U.S. 359, 361 (1952); Locafrance U.S. Corporation v. Intermodal Systems Leasing, Inc., 558 F.2d 1113, 1115 (2d Cir. 1977). The record makes it abundantly clear that the negotiators on both sides of the controversy, in competing for multi-million dollars of profit, were shrewd, experienced and calculating, albeit at times mutually overreaching beyond traditional notions of fair play. The bargain that they struck in terms of the

release of October 14, 1975, is short and clearly stated without ambiguity. "When ... a release is signed in a commercial context by parties in a roughly equivalent bargaining position and with ready access to counsel," the signatories are bound by their plain undertaking. Locafrance, supra at 1115.

The integrity of a general release thus founded is not easily impeached by claims of fraud in the inducement of the agreement. The attack against a bargained commercial release is a formidable task. Judge Pollack in the bench trial of Mittendorf v. J. R. Williston & Beane, Inc., 372 F. Supp. 821, 835 (S.D.N.Y. 1974), stressed the crucial factors involved in charges of fraud against a commercial release executed by experienced and counseled negotiators.

> All parties were ably represented by counsel; the negotiations were at arm's length, far ranging and of great duration; and, most importantly, the damage was obvious, and clearly appreciated by all sides. The release was validly obtained and executed. Moreover, the consideration which plaintiff obtained for his release was substantial.

In this case the views of Mr. Bray and those of his counsel, Mr. O'Brien, in negotiating the release were not always in accord. As Mr. O'Brien expressed it - he was for peace; his client favored war. Although the FEA repeatedly advised that

pursuit of an investigation concerning the 1973-74 contract would require a formal complaint, no charge was advanced by the Bray interests. On advice of counsel, it was Bray's strategy to remain in the wings, rather than the arena. Although Mr. Bray testified he was shocked and crushed by the letter of Pfefferkorn of August 28, 1975, indicating that the NOPV had been formally rescinded, no further inquiry of the true status was pursued. This was in keeping with the strategy that the Bray interests should refrain from direct involvement lest they be included as a party to the FEA proceedings at the risk of frustrating the efforts to successfully negotiate the 1975-76 supply contract.

To be sure, the misleading aspect of the rescission letter of August 28 was aggravated by Mr. Bray's testimony that Mr. Pfefferkorn, in a subsequent telephone call, stated to him that the FEA had found Chevron "innocent of any wrongdoing." This aspect of the evidence of fraud is reduced to mere fragment of proof in the light of Mr. Bray's deposition testimony that he would not trust Pfefferkorn as far as "he could throw this house." Bray explained that he believed Pfefferkorn's representation in the August 28, 1975 letter because he believed Pfefferkorn in anything he wrote under the name of the company he represented.

Mr. Bray testified he was shocked and devastated by this information from Mr. Pfefferkorn. He did not contact Mr. Costello or any representative of the federal agency to ascertain the true status of the investigation. There was no communication barrier between the FEA and aggrieved business or consumer interests concerning complaints and the status of the investigatory process. Bray and Chevron representatives alike were in frequent contact with Mr. Costello and Mr. Webster concerning federal energy matters.

After the Pfefferkorn letter of August 28, 1975 was received by Bray, he testified he was advised by his attorney Mr. O'Brien, in a letter dated September 9, 1975, to proceed with the complaint before the FEA since the mandatory allocations would protect supply, although perhaps on more stringent credit terms.

> I, therefore, feel somewhat stronger in having this matter resolved by FEA and so long as the mandatories continue see no particular risk to proceeding with the complaint. In view of the present situation, you hardly have any alternative.[9]
>
> The most recent news seems to indicate that Congress now is somewhat skeptical about being able to override the Presidential veto. The talk is that a deal will be made for controls being phased out over a 30-month period. I, therefore, hope that we will

be hearing from Borenkind soon, that the situation now has reached a point where there is no concern about the mandatories going off and, therefore, we can proceed with the complaint.

At the Albany meeting counsel for the FEA made it clear that the agency would not be bound by a settlement between Bray and Chevron if there was, in fact, a violation of the energy regulations. On September 23, 1975, Mr. Bray wrote the First National Bank of Glens Falls, New York:

> Of course it goes without saying that if Chevron is forced to pay us back for overcharges and other things we will pay you in full immediately. (Def. Exhibit 175)

These communications, coupled with the testimony of Mr. Bray and his attorney, make it abundantly clear that prior to the meeting in Albany on September 17, 1975, the plaintiff Bray and his counsel were fully aware that the Bray claims of violation of the federal regulations by Chevron in the 1973-74 contract had not been decided on the merits.

Mr. Bray testified the subject was discussed at Burlington on May 1, 1975, during an ex parte meeting with Mr. Costello of the FEA. Mr. Costello advised Mr. Bray, his attorney, and other Bray officials that the regulatory agency would not consider Bray's claims for relief from pricing terms in the 1973 contract unless a formal complaint was submitted to the Federal Energy Administration. Northern Oil

agreed to submit a formal complaint concerning the change in credit terms and business practices put into effect under the "as of May 1, 1973" contract.

At the Albany meeting the Bray interests were further informed that the release demanded by Chevron's representative would not bind the FEA if the federal regulations were, in fact, violated. This option was discussed in Mr. Bray's consultation with his attorney during the recess of the final bargaining session at Burlington on October 1st. When the bargain was finally struck the following day, the danger that a formal complaint to FEA would frustrate the contract negotiations was removed. And after the release was given, the Bray companies had the continuing assurance of the FEA that a release would not condone or extinguish past violations if they had indeed occurred.

This nature of the plaintiffs' proof simply is not of sufficient substance to sustain the answers given by the jury to the following interrogatories:

2e. The true reason for the rescission was not open to plaintiffs' knowledge.

2f. A false and misleading statement by Chevron's representative Eric Pfefferkorn was a controlling factor in the plaintiffs' decision to agree to the release in the sense that but for the representation, Dana S. Bray, Sr., would not have signed the release.

2g. The plaintiffs believed and relied on the false statements made by Eric Pfefferkorn.

> The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.

Restatement 2d Torts sec. 541.

> Although the recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he had shown his distrust of the maker's honesty by investigating its truth, he is nonetheless required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him, if he had utilized his opportunity to make a cursory examination or investigation.

Id. Comment a.

> Even at common law, if the plaintiff has been furnished with the means of knowledge and he is not prevented from using them he cannot say that he has been deceived by the misrepresentations of the other party. See Shappiro v. Goldberg, 192 U.S. 232, 241-42, 24 S.Ct. 259, 48 L.Ed. 419 (1904).

Frigitemp Corp. v. Financial Dynamics Fund, 524 F.2d 275, 282 (2d Cir. 1975).

Public Policy - Past Claims

The plaintiffs have consistently maintianed that the mutual release has no binding effect since it runs counter to established public policy in that it first condoned and then compromised violations of federal law. Confronted with a similar argument advanced in Mittendorf v. J. R. Williston & Beane, Inc., supra,

372 F. Supp. at 835, the court's reasoning there, in dealing with the federal securities law, applies to this aspect of the plaintiffs' contention in the case at hand.

> No rational basis has been suggested for depriving private parties of the right to acquit one another, retrospectively, of liability under open circumstances, whether the liability stems from conduct actionable under sec. 10(b) of the 1934 Act and its progeny or any other federally created right. Such liability, once matured and recongized, is susceptible of valid and binding release. To hold otherwise would be to thrust the Court into the business decisions of litigants inter se and to compel each party, regardless of his desires or the parcticalities of the situation, to wage his law in the arena, for surely the next step would be to argue that, just as parties may not compromise claims by release, so they may not compromise claims by extrajudicial settlement. Any such argument must of necessity fall of its own weight.

By the plain language of the release, the parties settled all claims under previously existing contracts in the context of the applicable federal law and regulatory scheme. Mr. Bray, on advice of counsel, made an intelligent choice to compromise, rather than undertake administrative or court proceedings at the time the release was executed. The plaintiffs are bound by that choice and their prior cliams are barred. Ruskay v. Waddell, 552 F.2d 392, 395 (2d Cir. 1977) (quoting Mittendorf v. J. R.

Williston & Beane, Inc., supra at 836) (release of all matters or transactions recited or described in the complaints).

Release of Future Claims

The claims for overcharges that have arisen since the date the release was given stand differently. If it can be said that Bray's acknowledgment "that it shall file no cliam, complaint or charge for its own intended benefit - or complaint or charge by any other party with the Federal Energy Administration involving Chevron's allocation and pricing practices ..." was intended to relieve Chevron from future violations of the energy regulation, such provision is without legal force and effect. E.g. Pearlstein v. Scudder & German, 429 F.2d 1136, 1142 (2d Cir. 1970) (Stipulation acquiescing in continuing violations of federal security law held void).

The release executed by Bray barred matured claims then accrued; it did not bar claims that might arise from future violations of federal law. Weinraub v. International Bank Note Co., Inc., 422 F. Supp. 856, 858 (S.D.N.Y. 1976); Korn v. Franchard Corp., 388 F. Supp. 1326, 1328-30 (S.D.N.Y. 1975; In Re Cohen's Will, 51 FRD 157 (S.D. 1970). See Also Van Houten Service, Inc. v. Shell Oil Co., 417 F. Supp. 523, 530 (D.N.J. 1975) (General release covers all claims and

demands due at the time of execution). Thus the plaintiffs' claims for overcharges arising from overcharges made by the defendants for products delivered after October 14, 1975, were not extinguished nor precluded.

Classification of the Bray Companies

Although the release compromised and settled all claims of mutual wrongdoing, including the overcharges assessed by Chevron against the Bray companies, the settlement agreement did not expunge the deception that was intended to, and did, according to the jury's verdict, induce the "as of May 1, 1973" contract. The fraud which infected the 1973-74 contract, according to the jury's verdict, had the wrongful purpose and design to avoid the base freeze date of May 15, 1973 under the Phase IV regulations. The "as of May 1" contract, according to the main thrust of the evidence and the jury's findings, formed the root and stock of Chevron's placement of the Bray companies in the New York Harbor Barge Buyer's class. This classification formed the primary basis for the price terms imposed in the supply agreements for the period ending May, 1975, that were compromised by the mutual release. The taint of fraud in the 1973 contract was perpetuated by the continuing classification of the Bray companies and the imposition of

prices according to the New York Harbor Barge Buyer classification for the supply of middle distillates after the release on October 14, 1975. This aspect of the case was the subject of extended discussion in the court's earlier decision of July 27 last. Northern Oil Company, Inc., v. Standard Oil, No. 78-231 (D.Vt. filed July 27, 1983).

Since the court now holds that all claims for damages arising under the 1973-74 and 1974-75 supply contracts are barred by the mutual release that was executed after the contracts were concluded, there is no need to revisit the evidence reviewed in the prior decision. For the purpose of examing the classification of the Bray companies and the prices charged by Chevron after the release, the court reaffirms the conclusion that the special verdicts relating to the 1973-74 contract are well founded on the overabundant evidence directed to that issue.

To give force and effect to the contract executed by the parties on July 11, 1973, as a basis for the pricing terms for the post release contract of '75-'76, would cut across the congressional findings and declarations of purposes engrossed in the Emergency Petroleum Allocation Act of 1973 (15 U.S.C sec. 751). The enactment expresses that the Congress determines that shortages of crude oil, residual fuel oil and refined petroleum "have created or will create severe economic dislocations and hardships" and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

. . .

(b) The purpose of this chapter is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this chapter shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

15 U.S.C. sec. 751(a)(3) and (b); Basin v. Federal Energy Administration, 552 F.2d 931 (Temp. Em. Ct. App.) cert. denied, 434 U.S. 821 (1977).[10]

The use of "as of May 1, 1973" contract as an instrument to justify Chevron's classification of the Bray companies in the New York Harbor Barge Buyer class is proscribed by the considerations of public policy stated in the Act. Legislative findings and purposes are prime factors in examining the legality of the undertakings by the parties under the applicable statutory law. Restatement 2d Contracts sec. 178(3).

Special Verdict No. 11 - Federal Price Regulations

The defendants have moved to set aside the jury's verdicts on special interrogatories 11(d) and 11(e) as unsupported by the evidence. These special interrogatories, taken as a group, were directed to the issue of whether, given the continued applicability of the 1968 contract prices and terms on May 15, 1973, the Bray companies were correctly placed in a separate class of purchaser, of which the Bray group was the sole member. The court holds that these verdicts should not be set aside in view of the evidence and the applicable law.

The class of purchaser[11] designation is critical in the process of determining the allowable charges to a given customer by a refiner, under 10 C.F.R. sec. 212.82. The correct base price is determined by deriving a weighted average price as of May 15, 1973 for all the members of a given class of purchaser. Were it found that the Bray companies were validly placed in the New York Harbor Barge Buyer class, they would have been correctly charged under the regulations based upon a weighted average price of the transactions with other members of that class on May 15, 1973, rather than upon the historical prices which they had paid prior to the price freeze.

In order to distinguish a class of purchaser, a differential between prices charged members of that class and other customers of the refiner must be found to have been a "customary price differential,"[12] rather than a competitive allowance or a random difference. It has been consistently recognized by the Federal Energy Administration (FEA) and its successor, the Department of Energy (DOE) in their administrative rulings, that a valid class of purchaser may contain a single member, if no other customers of the supplier share in common the relevant characteristics of that customer. FEA Ruling 1974-17, 3 CCH Energy Management sec. 16,027 at 16,039. The plaintiffs have contended throughout this litigation that they are such a customer; the defendants have, with equal vigor, contended the reverse.

It is undisputed that the Albany/Burlington tank car prices were the terms by which the Bray companies were charged under the 1968 contract. By force of the jury's finding of fraud in imposing the retroactive date to May 1, 1973, the preceding contract was in place on the base date. As such, it controlled the transactions between the parties as of May 15, 1973. Prices and allowances under the prior contract that was due to expire on May 31 were much more favorable to the plaintiffs than the New York Harbor Barge Buyer formula actually

charged by Chevron pursuant to the "as of May 1" contract and the succeeding supply agreements between the parties.

The initial distinction to be drawn, once it is determined that two customers were charged different prices, is whether those distinctions were competitive allowances or customary price differences. Interrogatory 11(c) asked the jury to determine whether the prices set in the 1968 supply contract between Chevron and the Bray companies represented competitive allowances The jury returned a negative answer. The defendants have not challenged this response to Interrogatory 11(c). In order to constitute competitive allowances or discounts, a price must have been granted to meet an actual lower bona fide offer to the customer, or to offset a price war subsidy of a competitor. FEA Ruling 1975-2, 3 CCH Energy Management sec. 16,042; see Pacific Service Stations Co. v. Mobil Oil Corp., 636 F.2d 306, 309 (Temp. Emer. Ct. App. 1980); Atlantic Richfield Company, 3 FEA sec. 80,564. The record does not compel a finding that any such circumstances existed in the situation of the Bray companies.

This interpretation of "competitive" was adopted by the FEA in Ruling 1975-2 to harmonize the requirements or the regulations with those of the Robinson-Patman Act. In so doing, the agency establish-

ed the principle that price distinctions which could be justified on the basis of cost savings to the supplier would be treated as customary differentials; such cost justified differential prices could be maintained for a protracted period without violation of the Robinson-Patman Act.

A principal function of the class of purchaser concept was to preserve the price distinctions that customarily existed under free market conditions among purchasers who were not similarly situated on May 15, 1973. FEA Ruling 1975-2, supra. The most important factors in determining classes of purchaser are differences in (1) location; (2) type of purchaser;[13] (3) volume; and (4) terms or conditions of sale or delivery. Any one of these elements may serve as the basis for a class of purchaser distinction, under the definition of that term. The jury was asked in Interrogatory 11(e) to determine whether the price differences accorded the Bray companies were cost justified based upon: first, the companies' location in relation to Chevron's Perth Amboy refinery; second, the volumes of product purchase by the companies; and third, certain terms and conditions of sale. The letter included the Bray companies' storage facilities and the fact that the Bray companies

historically purchased at the Albany/Burlington tank car prices. The jury found each and all of these factors resulted in cost justifications for the Bray companies' prices under the 1968 contract. In Interrogatory 11(d) the jury was asked whether each of these factors served as the basis of an established pricing policy of Chevron. The jury responded affirmatively as to each factor.

Evidence and papers submitted throughout this litigation indicate that the historical relationship between Chevron and the Bray companies was unique. Bray was initially viewed by Chevron as the distributor through which it would enter the northeast cold weather market for home heating oil and middle distillates. The Bray companies were Chevron's only major distributor for its product in the area of northern New York and Vermont during the period covered by the contracts in controversy here, and historically throughout a number of years preceding 1973. In order to obtain and keep the Bray companies as distributors of its product, supply agreements favorable to Bray were negotiated during the 1960's. The various pricing arrangements differed from those offered other customers. In the early 1960's the Bray companies lifted product F.O.B. New York Harbor, with certain discounts and allowances off the New York Harbor price.

The 1966 supply agreement, as amended in 1968, was found to be in effect on May 15, 1973. By that contract, the Bray companies obtained an arrangement in which they purchased product at the Albany/ Burlington tank car prices, with Chevron paying the barging costs and other allowances for the transportation of the product to the plaintiffs' doorsteps at Albany and Burlington.

The Bray companies developed extensive storage facilities for the product at Fort Ann, New York. The jury found that the existence of this Bray-owned storage capacity conferred a cost saving upon Chevron, in relation to the costs of supplying product to a comparable buyer without storage. As the supplier, Chevron took advantage of storage facilities which Bray had the foresight to construct with Chevron's financial guarantee, rather than construct its own storage facilities. This obvious inference underlies the jury's finding expressed in 11(e). While the defendant can point to some evidence by way of defense witnesses in support of its claim that the Bray storage facilities did not affect Chevron's costs or pricing, there is adequate evidence to support the jury's find in Interrogatory 11.[14]

The defendants argue, alternatively, that even if the jury's verdict is supported on this point, as the court holds it is, storage facilities constitute "real estate," a factor which they assert was eliminated from consideration in the establishment of customary price differentials in Templeton's Service, Inc. v. Mobil Oil Corp., 624 F.2d 1084 (Temp. Emer. Ct. App. 1980). That case is distinguishable from the situation before the court here. The factor disallowed there was a difference based upon whether retail gasoline dealers within a certain market area owned their stations or leased from Mobil. The court found that certain "upkeep" expenses were incurred by Mobil for the leased stations, pursuant to separate real estate leases with the dealers. The court held that there was no relation between service station rents, under separate contracts, and gasoline prices, and that the FEA had no authority to regulate service station rents. Defendants' reliance on Templeton as precluding any customary price distinctions, based upon buyer storage facilities for middle distillates, is misplaced, particularly where the storage facilities are not subject to leasing agreements forming separate contractual obligations between the parties.

The jury's finding that Chevron customarily classified its purchasers into pricing groups based

upon the annual volume purchased is also supported by evidence in the record. As with other aspects of the proof, there is evidence to the contrary; this is not sufficient to overcome the jury's verdict on this point.

Testimony by George Wyllie, currently the manager of marketing reserach for Chevron, U.S.A., and at the times relevant to this action in the Economics Department of Western Operation, Inc., and the Secretary's Office in Marketing Economics for SoCal, is relied upon by the defendants for the proposition that only volume per delivery, rather than total annual volume purchased, was relevant to Chevron in establishing pricing groups. The Bray companies purchased large annual volumes in comparison to other Chevron customers placed in the New York Harbor Barge Buyer class, but did not buy in larger delivery lots than some of the other purchasers. On cross-examination and in his deposition testimony, Mr. Wyllie conceded that total volume of products was a significant factor in the classification of purchasers.[15]

Location is the first, and perhaps the most important, factor in classifying purchasers. Interrogatories 11(d)(1) and 11(e)(1) were addressed to the Bray companies' locations with respect to Chevron's Perth Amboy refinery. Interrogatories 11(d)(3)(ii) and 11(e)(3)(ii) asked the jury whether the

fact that the Bray companies purchased under the contract at Albany/Burlington tank car prices arose from a cost-justified established pricing practice on the part of Chevron. Again, this inquiry concerns location.

Under the supply agreement in effect on May 15, 1973, the Bray companies were not required to lift product in New York Harbor. Chevron delivered middle distillates to Bray storage facilities at Albany and Burlington for sale by the Bray companies under the consignment arrangement then prevailing. To be sure, the product was barged from New York Harbor, but the barging costs for delivery to Bray's market were borne by the supplier. Bray bought outside New York Harbor, at locations different from those buyers who actually picked up the product F.O.B. New York Harbor at New York Harbor prices.[16]

The fact that the Bray companies purchased under the 1968 contract at Albany and Burlington, by virtue of being Chevron's only distributor in the upstate New York and Vermont market area, is a sufficient basis for treating the Bray companies differently from nearby customers who purchased in the New York Harbor. The court sustains the jury's finding that the prices charged at Albany and Burlington were cost justified.

As previously stated, the jury found that the prices granted Bray in the 1968 contract did not reflect competitive allowances. Nor were the differences between

Bray's prices and those granted to New York Harbor buyers "random," as that term is used in the administrative rulings. Random price differences are "short term sales and other temporary allowances that were neither cost-justified nor given in response to competitive conditions." Random differences are distinguished from "longer term discounts, which are more likely to reflect differences in location, volume, type of purchaser, etc., and therefore to represent 'customary' price differentials." Ruling 1975-2. To treat the carefully negotiated Bray contracts as "random" is contrary to the common and accepted meaning of the word. There is adequate support in the evidence to sustain the jury's finding that the allowances in the instant case were customary, rather than competitve or random. The defendants' attack on the answers made by the jury in Interrogatory 11 is not sustained.

Nature and Extent of Recovery

In its Memorandum of Decision dated July 27, 1983, the court ruled that the plaintiffs' recovery for damages would be limited to the remedies provided under Section 210(b) of the Economic Stabilization Act (ESA)[17], incorporated by reference in the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. sec. 754(a)(1). At a subsequent conference the court

granted the plaintiffs' request to submit written argument to support their claim that additional consequential and punitive damages are also recoverable beyond the remedy for overcharges under Section 210(b). The plaintiffs urge that sec. 210(a) permits them to recover consequential and punitive damages under remedies at common law for fraud and deceit. Upon consideration of the oral and written arguments submitted by the parties on these questions, the court is persuaded that its original ruling must stand.

The theme of the plaintiffs' contention for recovery on the basis of traditional concepts of common law fraud is that the defendants' deception caused the collapse of the Bray petroleum enterprises and related financial interests. Other than the overcharges asserted to be in violation of federal law, the jury was provided with no rational basis for establishing injuries suffered as a consequence of the fraud which induced and infected the 1973-1974 supply agreement.

For reasons state earlier in this memorandum, the court now holds that all claims for recoveries which occurred prior to 1975 have been compromised and released by express agreement of the parties. The only legal footing that remains for award of damages at the present stage of this litigation is confined to the claimed overcharges imposed by the defendants

under the supply agreement executed contemporaneously with the release of October 14, 1975.[18]

Putting the force and effect of the 1975 release aside for the moment, the full impact of the fraud claimed by the plaintiffs is based on the price controls imposed by virtue of the federal energy regulations. In an uncontrolled market there would have been no injury caused by Chevron's misrepresentation concerning the reason for its insistence on the retroactive effective date imposed in the 1973-1974 contract. The claims of fraud advanced by the plaintiffs are inextricable tied to the federal regulations.[19] The origin of the claims resides in the federal regulatory scheme; it is within that framework that they must be dealt with. It is only within those boundaries that the plaintiffs' award must be measured, in terms of the statutory sactions and litigation costs available under the pertinent provisions of the Economic Stabilization Act.

Interlocutory Order and Certification

For the reasons stated in this opinion and the court's prior memorandum of decision of July 27, 1983, the clerk is directed to enter the following interlocutory order:

1. The defendants' motion to set aside Special Verdict No. 1 (Direction and Control of Chevron U.S.A. by Standard Oil of California) is DENIED.
2. The defendants' motion to set aside the affirmative answers made by the jury in Special Verdict No. 2d, 2f, and 2g and the negative answer given in 2e (Mutual Release of October 14, 1975: Fraud) is GRANTED.
3. The defendants' motion to set aside the affirmative answers made by the jury in Special Verdict No. 5 (the 1973-1974 Contract: Fraud), 5a through 5c, 5g and 5h is DENIED.
4. The defendants' motion to set aside the answers made by the jury in Special Verdict No. 11d, 11e(1), (2), (3)(i) and (ii)(Federal Price Regulations) is DENIED.
5. The defendants' motion for rehearing and reconsideration of the court's prior decision of July 27, 1983 is DENIED.
6. The defendants' alternative motions for new trial on the special verdicts designated above are DENIED.
7. The trial of the damage phase of this action will be restricted to recovery under sec. 210(b) of the Economic Stabilization Act in accordance with the decisions of July 27, 1983 and today.

It is the court's opinion that the interlocutory order written above, entered on the decisions filed July 27, 1983 and today, involves the following controlling questions of law concerning which there is substantial ground for difference of opinion;

1. Does the element of fraud found by the jury in the inducement of the supply agreement executed on July 11, 1973 for effect as of May 1, 1973, invalidate the price terms imposed in the subsequent supply agreement for the contract year 1975-1976?
2. Should the plaintiffs' recovery in the trial on the issue of damage be restricted to the provisions of sec. 210(b) of the Economic Stabilization Act?

Without appellate review and answers to these questions the damage phase of this litigation may be misdirected. The trial court is convinced that an immediate appeal from the interlocutory order may materially advance the ultimate termination of this protracted and complex controversy. In invoking the provisions of 28 U.S.C. sec. 1292(b), the court finds precedent and guidance in the decisions of the district court in SCM Corporation v. Xerox Corporation, 474 F. Supp. 983 (D. Conn. 1979) (answering question certified consistent with district court holding). See also Dyke v. Gulf Oil Corp.,

601 F. 2d 557 (Temp. Emer. Ct. App. 1979).

Trial will be resumed on the issue of damages. A pretrial conference on that aspect of the case is now scheduled at Rutland on October 24, 1983, at 9:30 in the forenoon.

Dated at Rutland, in the District of Vermont, this 5th day of October, 1983.

James S. Holden
United States District Judge

FOOTNOTES

1 Plaintiffs' Exhibit No. 1015, letter from Eric Pfefferkorn to Dana S. Bray, Sr., August 28, 1975.

2 The full text of the FEA letter of rescission dated July 24, 1975 (Plaintiffs' Exhibit No. 994) is as follows:

> Dear Mr. Pfefferkorn:
>
> This letter will advise you of the rescission of the Notice of Probable Violation (NOPV) issued to CHEVRON (CHEVRON) OIL COMPANY on October 25, 1974.
>
> The NOPV indicated that the subsequent change in 1974 of the credit terms enjoyed by BRAY OIL COMPANY on May 15, 1973 constituted a probable violation of 10 CFR 210.62(a).

The sole basis for FEA's establishment of the May 15, 1973 credit terms was a contract between CHEVRON and the BRAY OIL COMPANY, dated May 1, 1973. In a letter dated June 22, 1973 from you to R. Case Prime, attorney for Bray, you stated: "We have been operating without any agreements since May 1, 1973. This arrangement is causing serious confusion internally in processing barge shipments, payments of invoices, and all other arrangements. It is of primary importance that new contracts be executed at the earliest possible date."

In light of that correspondence and supporting statements from BRAY officials, FEA determines that the aforementioned contract alone is not dispositive of the credit terms in effect on May 15, 1973.

Accordingly, without prejudice to any further remedial action as may become appropriate or necessary in this matter, FEA, Region I, hereby rescinds, effective immediately, the Notice of Probable Violation issued to CHEVRON on October 25, 1974.

3 Tr. 7738-7739.

4 The NOPV is in the form of a letter dated October 25, 1974, from Thomas Hagen, the FEO Area Manager in Boston, Massachusetts, to the Chevron Oil Company, and reads in relevant part as follows:

An examination has been conducted by the Federal Energy Administration to determine your compliance with Section 210.62 of the Federal Energy Regulations in the sale of petroleum products, on a credit basis, to Bray Oil Company, Inc. of Glen Falls, New York and Burlington, Vermont subsequent to May 1, 1974.

Section 210.62(a) states in part, "no supplier may require or impose more stringent credit terms or payment schedules on purchasers than those in effect for that class of purchaser on May 15, 1973."

Reference is hereby made to your letter as of May 1, 1973 to Bray Oil Company, Inc. which outlines the credit terms to be applied for the one year period ending April 30, 1974. It states, "With respect to sales from consigned Heating Oil and Kerosene stocks.....the payments for withdrawals must be received by us within 20 days of the close of the withdrawal period." These credit terms were modified as outlined in Exhibit A of your letter as of May 1, 1974 to Bray Oil Company, Inc.

Additionally, a discount of 1% on purchases was modified to conform to the revised payment schedule.

The aforementioned modifications constitute a probable violation of the Federal Energy Regulations.

5 Plaintiffs' Exhibit No. 932 is a letter written on May 2, 1975, by William J. Costello, Area Manager of the FEO, to Eric Pfefferkorn. This letter reads as follows:

Dear Mr. Pfefferkorn:

In our recent discussion, I told you that I would keep you abreast of the status of our investigation relating to the Notice of Probable Violation issued to Chevron Oil Company on October 25, 1974.

Northern Oil Company representatives advised me that they intend to file, in the near future, a formal complaint to the Federal Energy Administration concerning changes in business practices-including credit terms-from those in effect in May 1973. Obviously, such a complaint deserves some consideration by FEA before we resolve the problem of changes in credit terms between Chevron and Bray (Northern) in May, 1974.

We will investigate the complaint as expeditiously as possible once it is received. Of course, we will provide the Chevron Corporation with an opportunity to respond if the facts show a need for a response.

Please do not hesitate to call if you have any questions.

6 According to O'Brien's testimony, Chevron's Pfefferkorn intruded on Bray's hope of retaining Borenkind. Borenkind's explanation to Bray was a possible conflict of interest arising from his representation of Augsbury Oil interests.

7 Defendants' Exhibit 117.

8 Id.

9 Defendants' Exhibit 115.

10 The legislative history of the EPAA provides further insight into the public policies underlying the statute. Congress recognized the need to provide for prevention of the price gouging and windfall profits which could accrue to persons advantageously situated upon the institution of mandatory petroleum allocations:

> [T]he billwould require that the mandatory allocation program determine the prices of products or the methods for determining equitable prices of those products. This has been included on the premise that it does no good to require the allocation of products if sellers are then permitted to demand unfair and discriminatory prices. Several witnesses testified as to the need of coupling price controls with the mandatory allocations. The Committee does not intend that this authority must be exercised by setting specific prices for products at each level in the distribution system. For example, the regulation could merely state an equitable method for determining price levels, such as permitting a specified markup of base costs.

H.R. Rep. No. 531, 93rd Cong., 1st Sess., reprinted in 1973 U.S. Code Cong. & Ad. News 2582, 2589.

Further:

> The reference to equitable prices in paragraph (E) is intended to emphasize that the objectives of the mandatory allocation program are to prevent price gouging or price discrimination which might otherwise occur on the basis of current shortages. It is expected that prices for allocated fuels will be set at levels or pursuant to methods which will permit adequate compensation to assure that private property is not implicitly confiscated by the government. Moreover, it is expected that the President in exercising this authority will be conscious of the need to determine prices which equitably balance the objectives of obtaining adequate

supply and holding down consumer costs. Conf.Rep.No. 628, 93rd Cong., 1st Sess., reprinted in 1973 U.S. Code Cong. & Ad. News 2582, 2596.

Congress was also particularly concerned with maintaining the independent marketing and distribution sector of the petroleum distribution chain, in order to ensure the continued competitive viability of the industry:

> Item (D) expresses the Committee's concern for the non integrated sectors of the petroleum industry and most particularly for the independent refiner, and the independent branded and non branded distributor of refined petroleum products. These enterprises have an importance to the United States economy far out of proportion to their market shares, because they continually spur the major integrated firms to improve their own efficiency in the production, refining, transportation and marketing of products.
>
> The Committee has called for separate allocations to branded independent marketers and non-branded independent marketers. Each, under other sections of the bill, is to be allocated supplies equal to the supplies purchased or otherwise obtained by him in calendar year 1972 (where practicable). The Committee is especially concerned with the downstream vertical integration of the major oil companies into the distribution and retail levels of the market.

Id. at 2295.

The purpose of the regulations governing the allocation and price of covered petroleum products under the ESA and subsequently under the EPAA included the maintenance of "equitable prices," as

well as the rational distribution of products. The class of purchaser concept was a device to preserve customary free market price distinctions among buyers, after the imposition of controls which disrupted the functioning of this market:

> [A] principal function of the class of purchase concept is to preserve the price distinctions among purchasers that customarily existed under free market conditions. To achieve the objective of making covered products available at equitable prices, FEA regulations require sellers to group together customers that are similarly situated and to compute a weighted average of their May 15, 1973 selling prices in sales to those customers.

FEA Ruling 1975-2, 3 CCH Energy Management sec. 16, 042 at 16, 581.

11 "Class of purchaser" is defined in 10 C.F.R. sec.212.31 as follows:

> 'Class of purchaser' means purchasers to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers and other purchasers.

12 "Customary price differential" is defined in 10 C.F.R. sec.212.31 as follows:

> 'Customary price differential' includes a price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery.

13 It is not contended that the Bray companies were a different type of purchaser than other customers who were placed in the New York Harbor Barge Buyer class.

14 The testimony of Robert J. March (Tr. 8/10/82, deposition testimony, at pp.139 et seq.) explaining Plaintiffs' Exhibit No. 710 is illustrative of such evidence. This document was an internal Chevron analysis of its relationship with the Bray companies for the purpose of exploring future alternatives for conducting business with them, performed in 1974 by Mr. March, then a member of Chevron's economic analysis group. The exhibit contains a section devoted to decision alternatives for "continuing to supply and use [Bray's] storage," and the statement "[T]he immediate and long-range value to the Company of Bray's million barrels of seasonal storage must be considered." Alternatives suggested included pricing discounts.

15 Mr. Wyllie testified on January 18, 1983, on cross-examination as follows:

> Q Okay....Did Standard Oil recognize these [customary price] differentials based upon volumes purchased?
>
> A Volume per delivery, yes.
>
> Q Not on an annual volume basis?
>
> A It's something we could have considered certainly, I think generally, but I just don't recall doing it.
>
> Q Wasn't annual volume an important consideration in this classification matter?
>
> A I certainly did look to assure that all of these people did buy large annual volumes.

I mean if someone had been taking 10,000 gallons a year annually, I think that would have been a flag to investigate why they had appeared on the list.

Q Well, let's look at page 176 of your deposition. I call your attention to the last sentence on that page where there is a question which reads as follows--it appears in line 25. It is my question to you in your deposition in 1978. The question is, "Well, what I want to make sure I understand is that from your investigation of Chevron East's practices as it related to the Northeast classification, the quantity of product that was purchased by Northeast on an annual basis had no bearing on what class it would be put into." And what was your answer?

A I said, "No, I never said that. As a matter of fact, I stated twice that the fact that these customers took substantial volumes was one of the reasons that they were classified together."

Q The next question says, "But I'm talking about the annual amount." And what was your answer?

A "That's precisely what I was referring to, the fact that they took substantial annual volumes."

Q All right. So that was an important factor; right?

A Well, certainly if some customer had been taking a miniscule amount, that would have been a flag that gee, we better look at this a little further.

Q Now, if we go to our exhibit on the screen here, we see that the Bray Oil Companies for 1973, according

to this exhibit, purchased 54,496,000 gallons, about three times as much as the nearest other buyer on the list; correct?

A Well--

Q Do you see that?

A I do. Metropolitan is not on there.

Q I realize Metropolitan is not on there.

A I'm only referring to the companies on the list. Yes.

Q Now, isn't it a fact, based upon your testimony in 1978, that that annual volume is an important criteria in connection with the classification of the Bray Companies?

A Well--

Q Yes or no.

A Sure, they all took substantial volumes.

Tr. 1/18/83, at pp. 34-36.

16 In general, the predominant factors are said to require cost justification. In the case of location, this is interpreted to mean some cost savings in shipping the product to a given destination as opposed to shipment to a different location. As to this the DOE has stated:

> Cost-related factors that result in customary price differentials usually warrant the establishment of separate classes of purchaser since a seller is presumed to recover higher costs associated with a particular type of transaction by charging higher prices. It should be recognized, however, that a seller could also base its prices on elements that are not readily identifiable as cost-related factors but which it nevertheless considers regularly in setting prices. For example, a seller may have a mechanism for establishing prices on the basis of the customer's location even though its costs of delivering product to various locations are not substantially different. If the location factor was a customary basis for establishing price distinctions under unregulated market conditions, it should be recognized in the establishment of class of purchaser categories.

Champlin Petroleum Company, 4 DOE sec.80,101 at 80, 523.

In this decision, the DOE did emphasize the cost differences to Champlin in supplying product to various locations. However, it also acknowledged that where Champlin's cost of making product available to two different locations was identical, a customary price difference was nonetheless appropriate because "competitive conditions in [one of the two] areas customarily required Champlin to make product available to its customers at that location at a substantially lower price than that paid by its [customer at the other location]." Id.at 80, 538.

17 Section 210(a) of the Economic Stabilization Act is found at 12 U.S.C. sec.1904, note, and is not reproduced here. (In the interest of brevity, see petitioners' App. , where that sec.1904, note, is reproduced.)

18 This consequence restricts the plaintiffs' potential recovery to the statutory remedy and sanctions prescribed in Section 210(b) of the Economic Stabilization Act. The only violation of the federal regulations by defendants which has been shown is a misclassification under 10 C.F.R. sec. 212.31. This misclassification may have resulted in the defendants charging the plaintiffs prices in excess of the lawful ceiling. Such a violation constitutes an "overcharge" within the definition of Section 210(c). Where the only violation of the regulations is the charging of a price in excess of the applicable lawful ceiling, damages under the federal statute are limited to those provided in Section 210(b) of the ESA. U.S.Oil v. Koch Refining, 497 F.Supp. 1125, 1133 (E.D.Wisc.1980); Sobel Paper & Wire Co. v. Great Atlantic & Pacific Tea Co., 343 F.Supp.386,389 (E.D.Pa.1972); see Griffin v. United States, 537 F.2d 1130, 1135 (Temp.Emer.Ct.App.), cert. denied, 429 U.S.909 (1976) (sec.210(a) deals with right of those suffering "legal wrong" to sue; sec.210(b) deals with a specified type of legal wrong).

Plaintiffs are correct in their assertion that the term "legal wrong" in Section 210(a) is broader than the term "overcharge," as used in Section 210. Eastern Air Lines, Inc. v. Mobil Oil Corp., 677 F.2d 879, 881 (Temp.Emer.Ct.App. 1982)(discriminatory pricing in violation of 10 C.F.R. sec.210.62(b) should be addressed under sec.210(a)); U.S. Oil, Inc., v. Koch Refining Co., 518 F.Supp.957, 959 (E.D.Wisc.1981) (in claim under sec.210(a) for changes in credit policies in violation of 10 C.F.R. sec.210.62, consequential damages permissible). But plaintiffs have failed to demonstrate any type of violation of the regulations by the defendants other than a misclassification which may have resulted in overcharges.

19 To allow the plaintiffs to recover additional damages under a common law theory of fraud would open the door to a double recovery for the same injury. Newman Oil Co. v. Atlantic Richfield Co., supra, 597 F.2d at 275, upon which plaintiffs rely for the proposition that they are entitled to additional damages under sec.210(a) for the defendants' fraud is not to the contrary. In that case, plaintiffs alleged violations of state and federal antitrust laws, the EPAA, and common law breach of contract and false representation. The district court treated defendants'motion to dismiss under Fed.R.Civ.P.12(b)(6) as a motion for summary judgment under Fed.R.Civ.P.56, and granted summary judgment for the defendants on all

claims, including the fraud claims. There was no diversity of citizenship between the parties, and the jurisdiction of the federal district court to hear the common law fraud claims was raised as an issue on appeal. The court, in addressing this issue of whether jurisdiction over state law claims of fraud was granted under the jurisdictional prerequisites of the ESA, incorporated by reference in the EPAA, stated that:

> [sec.210(a) is] sufficiently broad to encompass a cause of action arising from a fraudulent representation intended to induce one to forego his rights under the EPAA.

Newman Oil v. Atlantic Richfield Co., supra, 597 F.2d at 279.

The court then remanded the case only because the district court had failed to give notice to the parties that it intended to treat the appellees' motion to dismiss as a motion for summary judgment. In so doing, the court stated that it found no error in the manner in which the district court construed the termination agreements at issue on their face, and noted:

> While we believe that appellants sufficiently stated their allegations of fraud and willfulness in the fourth and sixth counts of their amended complaint, we appreciate the opinion of the district court that price is the key issue, since it would appear that appellants' allegations of fraud were

> at all times secondary to their attempt to establish price under the pertinent regulations.

Id. at 279-80.

The case does not hold that independent damages are available for fraud in every case in which the ESA provides jurisdiction over such claims.

SPECIAL VERDICT

INTERROGATORY NO. 1

Did the defendant Standard Oil of California, through its authorized officers and agents, direct and control the acts and participation of the defendant Chevron's representatives in the consummation of:

1. The 1973-74 contract? Answer x (YES) or _____ (NO)

2. The 1974-75 contract? Answer x (YES) or _____ (NO)

3. The 1975-76 contract and the Mutual Release signed October 14, 1975? Answer x (YES) or _____ (NO)

4. In establishing the prices charged the Bray Companies and the credit terms provided during the period 1972 through 1976? Answer x (YES) or _____ (NO)

INTERROGATORY NO. 2

The Mutual Release of October 14, 1975: Fraud

2a. Did Eric Pfefferkorn represent to Dana S. Bray, Sr., either by false statements or by intentionally misleading statements, that the NOPV of October 25, 1974, had been rescinded on the merits?

YES x NO _____

2b. Did Eric Pfefferkorn know the representations to Dana S. Bray, Sr., were false or misleading?

YES x NO_____

2c. Did Eric Pfefferkorn make the representations regarding the rescission of the NOPV for the very purpose of inducing the plaintiffs to release claims that they had against Chevron?

YES x NO_____

2d. Was the true reason for the rescission of the NOPV unknown to the plaintiffs at the time that Dana S. Bray Sr. signed the mutual release of October 14, 1975?

YES x NO_____

2e. Was the true reason for the rescission of the NOPV open to the plaintiffs' knowledge at or before the time that Dana S. Bray, Sr., signed the mutual release of October 14, 1975?

YES x NO_____

2f. Was a false or misleading statement made by Eric Pfefferkorn a controlling factor in the plaintiffs' decision to agree to the release in the sense that but for the representation, Dana S. Bray, Sr. would not have signed the release?

YES x NO_____

2g. Did the plaintiffs believe and rely on a false or misleading representation made by Eric Pfefferkorn?

YES x NO_____

2h. Did the plaintiffs suffer financial harm as the result of being deceived by a representation made by Eric Pfefferkorn?

YES x NO_____

Your combined answers to the questions in Interrogatory No. 2 will determine the issue of fraud with respect to the October 14, 1975 release.

INTERROGATORY NO. 3

The Mutual Release of October 14, 1975: Duress

3a. Was Chevron's threat to continue the plaintiffs on cash before delivery credit terms wrongful and without justification?

YES x NO_____

3b. Was the financial predicament, if any, of the plaintiffs at the time of the signing of the release of October 14, 1975 caused and created by Chevron, rather than the result of general market forces or the plaintiffs' own actions?

YES x NO_____

3c. Did Dana S. Bray, Sr. sign the mutual release of October 14, 1975 involuntarily, as the result of economic pressure so severe that his will was overborne?

YES x NO_____

3d. Were the plaintiffs without any reasonable alternative through another supplier or by way of federal administrative agencies or the courts for obtaining a source of supply for the 1975-76 contract year?

Yes, the plaintiffs were without any reasonable alternative. x

No, the plaintiffs had one or more reasonable alternatives._____

If you are persuaded by clear and convincing evidence that all of the answers to questions 3a. through 3d. are "Yes," the claim of duress is established: If you answered any question in Interrogatory 3 "No," the mutual release cannot be avoided by reason of duress.

INTERROGATORY NO. 4

The Mutual Release of October 14, 1975: Ratification

4a. Did the plaintiffs ratify the release included in the 1975-76 contract by failing to disaffirm or repudiate the agreement within a reasonable time after they came to believe that they had been defrauded?

YES_____ NO__x__

4b. Did the plaintiffs ratify the release in the 1975-76 contract by failing to disaffirm or repudiate the agreement within a reasonable time after a reasonable alternative for obtaining supply became available?

YES__x__ NO_____

If the defendants have persuaded you by a preponderance of the evidence that the answer to either question 4a or question 4b is "Yes," the release in the 1975-76 contract would extinguish all claims and demands arising prior to October 14, 1975. If you have so answered, proceed to Interrogatory No. 11.

If your answers to both questions 4a and 4b are "No.," the defendants have failed to sustain the defense of ratification, and you should proceed to Interrogatory No. 5.

INTERROGATORY NO. 5

The 1973-74 Contract: Fraud

5a. Did Chevron negotiators represent to Dana S. Bray, Sr., that the reason for selecting the "as of May 1, 1973" starting date was to place all distributors of middle distillates on a uniform contract year?

YES__X__ NO_____

If your answer to Question 5a is "No," go directly to Interrogatory No. 6, omitting all remaining answers to Questions 5b through 5i.

5b. Was the Chevron negotiators' representation as to the reason for selecting the "as of May 1, 1973" starting date false or misleading at any time up to the time of signing of that contract?
YES x NO _____

If your answer to Question 5b is "No," go directly to Interrogatory 6, omitting all remaining answers to Questions 5c through 5h.

5c. Did the Chevron negotiators know at any time prior to the signing of the "as of May 1, 1973" contract that the representation as to the reason for the starting date was false or misleading and also intend Dana S. Bray, Sr. to rely on that representation?

YES x NO _____

5d. Did the Chevron negotiators know at any time prior to the signing of the "as of May 1, 1973" contract that the Cost of Living Council had selected May 15, 1973 as the freeze date?

YES _____ NO x

5e. Was the selection by the Cost of Living Council of the May 15, 1973 freeze date, if such a selection was made before the signing of the 1973-74 contract, unknown to the plaintiffs at the time the contract was signed?
YES x NO _____

5f. Was the selection by the Cost of Living Council of the May 15, 1973 freeze date, if such a selection was made before the signing of the 1973-74 contract, open to the plaintiffs'

knowledge at or before the signing of the contract?
YES x NO_____

5g. Did the Chevron negotiators ' representation as to the reason for the "as of May 1, 1973" starting date materially influence Dana S. Bray, Sr.'s decision to sign the 1973-74 contract?

YES x NO_____

5h. Did Dana S. Bray, Sr. believe and rely on the Chevron negotiators' representation as to the reason for the "as of May 1, 1973" starting date?

YES x NO_____

5i. Did the plaintiffs suffer financial harm as the result of Dana S. Bray, Sr.'s signing the 1973-74 contract?

YES x NO_____

Your combined answers to the questions in Interrogatory No. 5 will determine the issue of fraud with respect to the 1973-74 contract.

INTERROGATORY NO. 6

The 1973-74 Contract: Duress

6a. Did Willis Price make an oral promise to Dana S. Bray, Sr. in 1968 that the Bray companies would be assured of a continued supply of petroleum products, including middle distillates, at competitive prices as long as the Bray companies had any guaranteed loans outstanding?

YES x NO_____

6b. Did an oral promise of continued supply of petroleum products at competitive prices throughout the lifetime of any guaranteed loans induce the plaintiffs to take out guaranteed they otherwise would not have taken out in their own self-interest?

YES x NO_____

6c. Was reliance by the plaintiffs on this oral promise by Willis Price reasonable in light of all the circumstances?

YES X NO_____

6d. Did the plaintiffs suffer financial detriment as a result of their reliance on the oral promise and their consequent participation in the guaranteed loan program?

YES X NO_____

6e. Did Chevron's insistence from December 26, 1972 on that any new contract between the Bray companies and Chevron be at a New York Harbor Barge Buyer price plus freight violate a promise to supply product at competitive prices throughout the lifetime of any guaranteed loans?

YES_____NO x

6f. Did Dana S. Bray, Sr. sign the 1973-74 contract on July 11, 1973, involuntarily and because his will was overborn by the economic pressures put on the Bray companies?

YES X NO_____

6g. Were the economic pressures on the Bray companies that existed at the time the 1973-74 contract was signed caused by Chevron, rather than by market forces in general or by the Bray companies' own actions:

YES X NO_____

6h. Did the plaintiffs have any reasonable alternative open to them through another supplier or by pursuing administrative or judicial remedies to obtain a supply of product for the 1973-74 contract year?

YES_____NO x

INTERROGATORY NO. 7

The 1973-74 Contract : Ratification

7a. Did the plaintiffs ratify the 1973-74 contract by failing to act promptly to repudiate the 1973-74 contract after they came to believe that a fraud had been practiced on them?

YES_____ NO X

7b. Did the plaintiffs continue to accept the benefits of the 1973-74 contract after a reasonable alternative to obtaining product from Chevron under that contract's terms had become available to them?

YES_____ NO X

INTERROGATORY NO. 8

The 1974-75 Contract: Duress and Change in Credit Terms

8a. Did Chevron threaten to terminate supply of product after the close of the 1973-74 contract year unless the Bray companies agreed to substitute a fixed schedule of payments for the consignment arrangement that was previously in place?

YES x NO_____

8b. Did Chevron's threat, if any, to terminate supply of product place the plaintiff companies under economic pressure so severe that Bray's will was overborn and Dana S. Bray, Sr. was forced to sign the 1974-75 contract involuntarily and against his will?

YES x NO_____

8c. Were the plaintiffs without any reasonable alternative available to them through another supplier or by pursuing administrative or judicial remedies to obtain a source of supply for the 1974-75 contract year?

Yes, they were without any alternative

source of supply_____x

No, the plaintiffs had one or more reasonable alternative sources of supply____

8d. At the time the 1974-75 contract was signed, in May 1974, did the changes in the plaintiff companies' credit terms from a consignment arrangement to a fixed schedule of payments impose more stringent credit terms?

YES____X NO_____

8e. Did the plaintiffs sustain financial losses as a result of a threat by the defendants to terminate supply unless the change in credit terms was included in the 1974-75 supply contract?

YES__X____NO_____

If you have answered "No" to any of the questions 8a. through 8e, the plaintiffs have failed to establish the 1974-75 contract was induced by duress.

If you are persuaded by clear and convincing proof that all the answers to questions 8a through 8e are "Yes," the plaintiffs have established that the 1974-75 contract was in violation of the regulations and without legal force and effect unless the change in credit terms was justified because of Bray's participation in the Green Mountain Petroleum transaction in the summer of 1973.

INTERROGATORY NO. 9
The Green Mountain Petroleum Transaction

9a. Did the Bray companies violate the terms of the consignment agreement with Chevron under the supply contract for 1973-74 when the plaintiff Northern Oil company transferred some seven million gallons of No. 2 oil to Green Mountain Petroleum Company in June through August of 1973 without reporting the arrangement to Chevron until later?

YES__x__NO_____

If the plaintiffs have persuaded you by a preponderance of the evidence that the answer to question 9a is "No," answer question 9b; otherwise proceed to Interrogatory No. 10.

9b. In demanding a fixed schedule of payments based on the plaintiffs' 1972 withdrawals of product, did Chevron have a good faith belief that the pplaintiffs had violated the terms of the consignment agreement in effect in the summer of 1973?

YES_____ NO_____

The burden of persuading you that the answer to question 9b is "Yes" is on the defendants, by a preponderance of the evidence. If your answer to either question 9a or question 9b is "Yes," Chevron's requirement of the fixed schedule of payments in the 1974-75 contract would be justified.

After answering question 9a and, if appropriate, question 9b, proceed to Interrogatory 10.

INTERROGATORY NO. 10

10a. Did the plaintiffs accept the benefits of the 1974-75 contract after a reasonable alternative source of supply for obtaining product became available to the Bray companies?

YES_____ NO x

INTERROGATORY NO. 11

11a. You have been presented with evidence that a bargeload of product was lifted at Chevron's Perth Amboy, New Jersey refinery on either May 15 or May 16, 1973, and was subsequently taken by Captain Kehoe to Bray Oil Company's Fort Ann, New York Storage facility.

1) When did the loading of product onto the barge in the New York harbor begin?
May 15, 1973_____ May 16, 1973__x___

2) Did title to that product pass to Bray Oil in the New York Harbor on May 15, 1973?
YES_____NO__x___

3) Had Chevron and Bray Oil orally agreed to the essential terms of that sale, including a New York Harbor Barge Buyer price, on or before May 15, 1973?
YES_____NO__x___

11b. Four shipments of Chevron No. 2 oil and kerosene were made by tank car from Bray Terminals' Rensselaer, New York facility to Bray Oil and Northern Oil in early May of 1973. Prior to those shipments, had Chevron and the plaintiffs agreed that the terms of those shipments would be pursuant to a New York Harbor Barge Buyer price, plus freight?

YES_____NO__x___

The 1968 supply agreement between Chevron and Bray Oil provided for a Burlington and Albany tank car pricing formula, minus certain discounts. In questions 11c through 11e you must compare that pricing formula with the prices charged other customers that Chevron placed in its New York Harbor Barge Buyer class.

11c. Were the differences between the prices charged the Bray companies and the prices charged other customers Chevron placed in its New York Harbor Barge Buyer class competitive allowances?

YES_____NO__x__

11d. Were the differences between the prices charged the Bray companies and the prices charged other customers that Chevron placed in its New York Harbor Barge Buyer class the result of an established pricing policy or allowance to the Bray companies based on

1) the Bray companies' location in relation to Chevron's Perth Amboy refinery?

YES___X_____NO_____

2) the volume of product purchased by the Bray companies?

YES___X__ NO_____

3) terms or conditions of sales to the Bray companies:

i) the Bray companies' storage facilities:

YES__x__NO_____

ii) the Bray companies' taking product at Albany and Burlington pursuant to posted tank car prices?

YES__X__NO_____

If you answered every question in question 11d "No," STOP HERE, omitting question 11e. If you answered one or more questions in question 11d "Yes," then answer the corresponding question in question 11e where your answer to the corresponding question in question 11d was "No."

11e. Did any of the following characteristics of the Bray companies result in a cost-related price differential, in that it resulted in a substantial cost savings for Chevron to do business with the Bray companies rather than some other customer?

1) the Bray companies' location in relation to Chevron's Perth Amboy refinery?
YES x NO_____

2) the volume of product purchased by the Bray companies?
YES X NO_____

3) terms or conditions of sales to the Bray companies:

i) the Bray companies' storage facilities?
YES x NO_____

ii) the Bray companies' taking product at Albany and Burlington pursuant to posted tank car prices?
YES x No_____

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Northern Oil Company, Inc., Bray Oil Company, Inc., Northern Terminals, Inc., and Dana A. Bray	)	
v.	)	Civil Action
Standard Oil Company of California and Chevron, U.S.A., Inc.	)	File No. 78-231

MEMORANDUM OF DECISION

The plaintiffs jointly instituted this action seeking to recover damages under the Emergency Petroleum Allocation Act, 15 U.S.C. § 751 et seq. for the defendants' alleged violations of the Mandatory Petroleum Price Regulations. This aspect of the action is combined with a traditional common law action charging fraud. The defendant Chevron counterclaimed for money owed on a note. The court ordered that the trial be bifurcated into a liability phase and, if necessary, a damages phase. By stipulation of the parties, the case was tried to an eight person jury, with two alternates. The liability trial began on July 20, 1982, and continued, with

brief recesses, until March 3, 1983. Counsel presented closing arguments on February 15, 1983; the court charged the jury on February 16, 1983; and the case was submitted to the jury on February 17, 1983, by way of special verdicts, consisting of answers to eleven principal interrogatories and subordinate questions. It is the jury's answers to those interrogatories returned on March 3, 1983, that form the subject of the instant motions. Oral argument was heard by the court on June 3, 1983.

On the basis of the jury's answers to certain interrogatories, the plaintiffs have filed a motion under Rule 58(a), Federal Rules of Civil Procedure, for judgment establishing the defendants' liability on all counts charged in the complaint. Conversely, the defendants have moved for judgment dismissing the plaintiffs' complaint in its entirety. In short, the parties dispute the meaning and legal effect certain of the jury's answer to the special verdicts. The defendants have also presented

separate and thoroughly briefed motions to set aside the special verdicts of the jury pertaining to the mutual release of 1975, the 1973-74 contract and the Federal Regulations. In the alternative, the defendants have moved for a new trial on each of the special verdicts which bear on these issues.

The Court's research has failed to develop any precedent in this circuit or elsewhere for the application of Rule 58 to interdict the damage phase after special verdicts have been returned on questions of liability. The primary purpose of the rule is to indicate to the parties that an act dispositive of the case has been taken and early entry of final judgment will follow without delay. The pertinent provisions are:

> (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it.

Of course, if the answers stated by the jury in their answers to the interrogatories mandate that the plaintiffs be denied all relief on all claims composed in the evidence, the defendants would be entitled to judgment of dismissal. The plaintiffs, while offering no written argument to support their Rule 58 motion, do strenuously resist the defendants' motion for judgment of dismissal and have filed written argument in opposition.

The court holds that final judgment of dismissal at this stage cannot be granted. However, since final disposition may be hastened somewhat by examining the grounds of the motion in depth, the court will undertake to explain. Before doing so, the underlying facts will be reviewed in the conspectus most supportive of the answers returned by the jury.

Background

Chevron sold petroleum products to the plaintiffs for several decades prior to the institution of price controls on petroleum products in the early 1970's. These sales included both

gasoline and middle distillates (kerosene and No. 2 home heating oil), but it is only middle distillate pricing that is at issue here. The terms of middle distillate sales in the late 1960's and early 1970's were pursuant to a 1966 contract, extended by letter agreement of the parties in 1968. Essentially, these terms were that the plaintiffs bought middle distillates from Chevron at so-called Albany and Burlington posted tank car prices, minus certain discounts. Chevron bore the cost of transportation of its product from its Perth Amboy, New Jersey, refinery to the plaintiffs' market area in Vermont and upstate New York.

These contractual arrangements between the parties were due to expire on May 31, 1973. For various reasons, including primarily changing market conditions with increased demand on delivering supplies of product, coupled with alleged delinquency in the Bray accounts, Chevron found that its profits derived from Bray declined under the 1966 contract as

extended. In a letter dated December 26, 1972, Chevron informed the plaintiffs that any new contract would have to be pursuant to a New York Harbor barge buyer pricing formula, which would shift the cost of transporting product from Chevron's plant at Perth Amboy to plaintiffs' market area, to the plaintiffs.

The plaintiffs objected to this proposal. Ultimately, however, negotiations were undertaken between the parties. These negotiations commenced in February and March of 1973. From the outset the defendant Chevron adhered to its position that the new contract would have a starting date of May 1, 1973. The parties were unable to agree by that date, and it was not until July 11, 1973, that the first of the documents comprising what has been referred to in this case as the "as of May 1, 1973 contract" was signed. The "as of May 1, 1973 contract" provided for a New York Harbor barge buyer pricing formula, without allowances to the plaintiffs for transportation costs.

On July 19, 1973, the Cost of Living Council proposed for notice and comment a regulation fixing May 15, 1973, as the "freeze date" for purposes of Phase IV of the federal energy regulatory program. Rumors of a mid-May 1973 freeze date had previously been reported by the press. The plaintiffs have contended that the reason defendant Chevron's agent Eric S. Pfefferkorn flew to Burlington, Vermont, and executed the first of the "as of May 1, 1973 contract" documents on July 11, 1973, was because Chevron had advance knowledge of the May 15, 1973, freeze date.[1/]

After July 11, 1973, and continuing through the summer of 1973, the parties signed various other documents forming the "as of May 1, 1973 contract." This contract, as indicated, provided that Chevron would sell the Bray companies middle distillates at the New York Harbor Barge Buyer price. In addition, the contract continued a provision of the previous contract that Bray would have Chevron product on consignment whereby Bray was not obligated

to pay for Chevron middle distillates until the the consignee withdrew such product from its storage facilities for sale.

During the summer of 1973, Northern Oil transferred nearly seven million gallons of middle distillates to Green Mountain Petroleum Company and received from Green Mountain $1,168,531.84 in payment, without reporting the transactions to Chevron. The "as of May 1, 1973 contract," like its predecessor, required the Brays to report withdrawals of Chevron product from Bray storage, and to make payment therefor, within a short period after the withdrawal. Chevron learned of these withdrawals quite by chance in early 1974, some months after the transactions occurred. When confronted with this knowledge, Dana S. Bray, Sr., claimed that the transfers to Green Mountain had been what he termed a "prepaid consignment" arrangement: namely, that Northern Oil retained ownership of the product, which was on consignment to Green Mountain, but had been paid for in advance.

Chevron, believing the Green Mountain

to be a violation of the letter or at least the spirit of the consignment arrangements between the parties, proposed a new credit arrangement when the parties began to negotiate a supply agreement for the 1974-75 contract year. This was that Bray would pay for product received pursuant to a fixed schedule based on its actual withdrawals in the previous year. The price terms of the "as of May 1, 1973 contract" were repeated in the 1974-75 supply contract, which ran from May 1, 1974, to April 30, 1975.

By way of a complaint that originated with one of Bray's customers who was supplied by Bray Oil for retail sale, the change in credit terms in the 1974-75 contract came to the attention of the Federal Energy Administration. In response, on October 25, 1974, the FEA issued a Notice of Probable Violation ("NOPV") to Chevron and thus commenced a formal investigation into the legality of the change in credit terms. At approximately this same time, in November of 1974, Bray took unilateral action and ceased to pay Chevron in

accordance with the fixed schedule of payments in the 1974-75 contract. Instead, Bray put himself back on consignment and paid Chevron only after withdrawing product for sale. Since the winter of 1974-75 was unusually mild, withdrawals from storage took place more slowly than they had the previous year and at the end of the heating season, more than a quarter of Bray's inventory remained unsold. Chevron believed Bray was remiss in failing to pay for this product in accordance with the fixed schedule in the 1974-75 contract; Bray believed the fixed schedule was illegal under a regulation then in force prohibiting the imposition of more stringent credit terms on a customer unless prior approval was obtained from the FEA.

The parties failed to reach agreement on a new supply contract prior to the expiry of the 1974-75 contract. Chevron was unwilling to extend Bray any credit at all until Bray paid past due obligations of approximately $4,000,000 for the Chevron product left over in Bray's storage tanks from the winter of 1974-75. Bray

protested that it would be impossible to do so. Summer, which ordinarily is the time for barging heating oil up the Hudson to Bray's storage facilities, arrived with no agreement reached for the ensuing heating season.

On July 24, 1975, the FEA notified Chevron that it was rescinding the NOPV issued against Chevron. The FEA had determined to broaden the investigation to include the pricing changes made in 1973, as well as the changes in credit terms made in 1974. Technical rescission of the original NOPV was accomplished by FEA, as a preliminary procedural step to the issuance of a new NOPV to broaden the scope of the initial investigation. It appears that the expanded investigation would include the question of the retroactive effect of the "as of May 1" provision in the contract signed July 11, 1973.[2/]

In a letter dated August 28, 1975, Chevron's agent Eric S. Pfefferkorn wrote Bray:

> . . . .We believe you are familiar with the FEA's NOPV of October 25, 1974 directed

> to Chevron, but you may not be aware that FEA has formally rescinded their NOPV of that date. With the past due account in the amount of approximately $3,500,000 and also lack of current financial information, we regret to advise you that we cannot supply you with middle distillate products on extended credit terms unless your account is brought to a current status and unless we can satisfy ourselves on the future credit reliability of your company.

Both parties were under some pressure to reach an agreement. Bray had been able to buy four barge loads of product on a cash basis from Chevron in June and July, 1975. This was only a portion of his requirements, and he experienced a shortage of the cash needed to purchase more product from the defendant. Against this contention, the defendants presented evidence, disputed by the plaintiffs, that Bray could have financed his necessary supply by borrowing to pay for future deliveries. Since the Bray companies were Chevron's largest purchaser for resale in the Northeast, Chevron feared negative publicity if its dealers had inadequate product to supply their customers. On September 17, 1975, at the instance of Bray, a meeting was held at Albany, New York, attended by

representatives of the FEA and of Vermont and New York state energy agencies, as well as by the parties. The parties repeated their bargaining positions, without coming to an agreement. Both sides were represented by counsel.

After further negotiations between the parties Chevron and Bray ultimately came to an agreement, executed on October 14, 1975. Bray Oil's debt to Chevron would be liquidated through an interest-free promissory note in the amount of $2,946,820.77, to be paid in installments by April 10, 1976. Bray Oil was to pay for product within thirty days after delivery, which was to be by tank truck, rather than barge load. And Finally, and of critical importance in this lawsuit, the parties executed a mutual release releasing all claims that each may have had against the other.

Bray made a number of payments on the promissory note and reduced the balance due to $786,820.77. However, he was in default at various times in the winter and spring of 1976. He also failed to pay Chevron $1,022,940.00

owed for middle distillates and gasoline delivered by Chevron between March 22, 1976 and April 30, 1976. In the summer of 1976, Bray sold or leased his various properties and prepared to retire to Florida. Chevron instituted suit in Chittenden Superior Court on August 2, 1976, to recover the unpaid balance on the promissory note to enforce payment for product delivered to Bray in the spring, and to attach several properties. In 1978 the plaintiffs commenced the instant suit in this court and the action in Chittenden Superior Court was stayed pending the outcome of the federal litigation.

Discussion

Early in the trial the particular content of the pleadings was lost in the burgeoning evidence presented by way of hundreds of documents and day after day of testimonial evidence concerning the negotiation, execution and performance by the parties under three consecutive contracts for the supply of middle distillate heating oils. The contracts relate to supply for the years

designated as 1973-74, 1974-75 and 1975-76.

The initial count of the complaint charges the defendants with violation of the Emergency Petroleum Marketing Act (EPMA) and the federal energy regulations. The federal claim is followed by allegations of fraud and duress in each of the contract years. The final count alleges fraud in a mutual release executed by the parties on October 14, 1975, at the inception of the formal written supply contract for 1975-75.

Chevron and SoCal vigorously defended all claims by the plaintiff of fraud and duress in the supply contracts. The defense asserted, in the alternative, that if it could be said that fraud or duress infected any of the supply agreements or the mutual releases of October 14 1975, all the contractual undertakings were ratified. The defendants have persisted throughout all the proceedings that the plaintiffs' claims of fraud, duress and overpricing that accrued prior to October 14, 1975, were validly extinguished by the mutual releases exchanged on that day. The defendants have

consistently maintained the Bray companies were lawfully placed in the correct class of purchaser, pursuant to the applicable federal price regulation.

As previously stated, the issues structured by the evidence, throughout the many weeks of trial on the liability phase of the litigation, were submitted to the jury by way of eleven interrogatories which were made up of subordinate questions, totaling fifty-two. The answers to these questions constitute the special verdict returned by the jury.

The underpinning for the claims of fraud is centered on the contract signed by Dana S. Bray on July 11, 1973, for the supply of kerosene and No. 2 oil for the period 1973-74. The linchpin connecting the claimed fraud to the federal statutory claims for recovery under the energy regulations is the effective date of the contract in place on May 15, 1973. That specific provision of the 1973-74 contract undertook to make the supply agreement retroactive to May 1, 1973, although on that date the prior supply

contract, as amended in 1968 between the parties had thirty additional days before its expiration date on May 31.

The plaintiffs' claim of fraud on this aspect of the litigation was that Chevron's executive, Eric Pfefferkorn, who negotiated the 1973-74 supply agreement, represented to the plaintiffs' representative Dana S. Bray, Sr. that the purpose of the May 1 starting date was to put the Bray companies on the same standard contract year as all other Chevron distributors. The plaintiffs contended that when the contract was signed by Bray on July 11, 1973, the defendants Chevron and SoCal knew, or had good reason to understand, that the Cost of Living Council (CLC) would select May 15, 1973 as the crucial date for freezing and thereafter controlling prices for middle distillates.

The jury, by its answers to Interrogatory No. 5, found:[3/]

5a. The responsible officials represented that the reason for selecting the "as of May 1, 1973" starting date was to

place all distributors of middle distillates on a uniform contract year. (Answer 5a.)

5b. The reason given by Chevron for selecting the "as of May 1, 1973" starting date was false and misleading. (Answer 5b.)

5c. Prior to the signing, Chevron's officers intended for Bray to rely on the reason given for the May 1 date. (Answer 5c.)

5d. and 5e. Neither Chevron nor Bray knew at the time of signing that the Cost of Living Council had selected May 15, 1973, as the freeze date. (Answer 5d. and 5e.)

5g. The representation by Chevron concerning the reason for the "as of May 1, 1973" starting date materially advanced Bray's decision to sign the contract. (Answer 5g.)

5h. and 5i. Bray relied on the representation and suffered financial harm as a

consequence. (Answer 5h. and 5i.)

Interrogatory 5f. called upon the jury to answer the following question: "Was the selection by the Cost of Living Council of the May 15, 1973 freeze date, if such a selection was made before the signing of the 1973-74 contract, open to the plaintiffs' knowledge at or before the time the contract was signed?" To this question the jury answered "Yes."

The defendants contend the finding by the jury that the selection of the May 15, 1973, freeze date was open to the plaintiffs' knowledge precludes any recovery for actionable fraud. Defendants advocate further that the absence of fraud in the inducement of the 1973-74 contract that all prices demanded and paid under that supply agreement in place "as of May 1, 1973" destroys the plaintiffs' federal claim for unlawful pricing under the Phase IV regulation. These consequences, the defendants maintain, establish their entitlement to judgment dismissing all of plaintiffs' claims for monetary or other relief.

In consulting the law of Vermont concerning contracts of purchase, it frequently has been written and repeated:

> To support an action for fraud or deceit, the representations must be of existing facts relating to the subject matter of the contract, affecting its essence and substance, not matters of judgment or opinion, nor of facts that will exist, nor of promises. The representations must be made by the seller to induce the buyer to enter the contract; they must be false and at the time known by the seller to be false; or made by the seller as of his own knowledge without his in fact knowing them to be true; they must not be open to the knowledge of or known by the buyer and must be relied upon by him in entering the contract to his damage.

E.g., Union Bank v. Jones, 138 Vt. 115, 121 (1980); Anderson v. Knapp, 126 Vt. 129, 133 (1966).

> The well settled doctrine in Vermont is that when it is established that a plaintiff has been induced to act by fraudulent misrepresentations, it is no excuse for the defendant, nor does it lie in his mouth to say, that the plaintiff might, but for his own neglect, have discovered the wrong and prevented its accomplishment.

Negyessy v. Strong, 136 Vt. 193, 195 (1980); Lunnie v. Gadapee, 116 Vt. 261, 265 (1950); (citing Niles v. Danforth, 97 Vt. 88, 96 (1923); Jones v. Stearns, 97 Vt. 37, 44 (1923); Smith v. Martin, 93 Vt. 111, 121 (1919);

Arnold v. Somers, 92 Vt. 512, 520-521 (1918); Maidment v. Frazier, 90 Vt. 520, 527 (1916).

The "open to the knowledge" clause quoted above was included by way of dicta in the cases cited. The language is referred to in Thomas v. Johnson, 108 Vt. 363 (1936) (Sherburne, J.). There the court observed the general rule that where the terms of two agreements between the parties are inconsistent and cannot subsist together, the later contract abrogates the earlier provisions. Id. at 368. The court went on to hold where the second agreement was induced by representations falsely made to the harm of the party who relied upon the statements, the later agreement is fraudulent. Id. at 370.

The jury determined that the defendants falsely represented that the reason for making the contract become effective May 1, 1973, prior to the signing, was merely to put all of the defendants' distributors on a uniform contract year. The jury's answers, which followed, contain all of the essential elements of fraudulent conduct.

The interrogatories submitted to the jury did

not include the question of whether the falsity of the reason given by Chevron was open to Bray's knowledge. The question presented to the jury in 5f. was whether the selection of the May 15 freeze date by the Cost of Living Council was open to the plaintiffs' knowledge. The answer given for making the contract retroactive to May 1 was open to the plaintiffs' knowledge.

The evidence makes it clear that there was considerable speculation in the oil industry concerning the May 15 date shortly before it was submitted for comment by the Cost of Living Council on July 19, 1973. The answers given by the jury in 5d. and 5e., to the effect that the selection date of May 15 was unknown to both parties, do not rectify the fraud which the jury found induced the 1973-74 contract.

The trial of this aspect of the case proceeded on the theory that the contract signed on July 11, 1973 was made retroactive to May 1 to extinguish the prior supply contract that would otherwise be in effect until June 1, 1973. It was the plaintiffs' contention that the

defendants knew or anticipated that the base price date would be selected during the month of May and the "as of May 1" date was fraudulently designed to avoid the consequence of having the price of middle distillates determined under the 1968 supply agreement, which otherwise would not have expired until May 31, 1973.

The financial detriment suffered by the Bray companies, if any, can only be ascertained by application of the federal energy regulations during the contract years in suit.

The taint of fraud which the jury found in the starting date of the 1973-74 contract is not purged by the jury's finding that selection of the critical base freeze date was open to the plaintiffs' discovery. Since the fraud found by the jury directly bears on the classification assigned by the supplier and the legality of the charges made under the regulations then in effect, the question presented is entirely one in the federal domain. The financial harm suffered by the plaintiffs, if any, as a

consequence of the wrongdoing can only be measured by the correct application of federal law. The problem exceeds the dimensions of the conventional action for common law fraud.

Duress

The second aspect of the defendants' motion for entry of judgment is based on the jury's response to interrogatory 6e. on the plaintiffs' claim that the 1973-74 contract was induced by improper threats made by Chevron in a situation of Bray's economic stress. The claim is that Bray's financial predicament left the plaintiffs no reasonable alternative, other than to sign the 1973-74 contract. The court explained to the jury the basis of the plaintiffs' claim that the threat was improper. The plaintiffs contended that Chevron's president, Willis Price, had orally agreed with Bray in 1968 to continue to supply the Bray companies with petroleum products as competitive prices as long as any Bray loans, guaranteed by Chevron, remained outstanding. The court instructed the jury that an alleged threat to disregard an unenforceable

oral contract that was later superseded by a written agreement was not to be considered wrongful. Threats to enforce a party's legal rights do not constitute duress. DiRose v. PK Management Corp., 691 F.2d 629, 633 (2d Cir. 1982).

The Court, however, instructed the jury that they could consider the question of oral agreement and the claimed violation of that undertaking as bearing on the question of whether the alleged threat was improper as a violation of good faith and fair dealing within the concept of the Restatement 2d, Contracts §§ 176(1)(d). The jury answered the inquiry in Interrogatory No. 6e. by saying there was no violation of the alleged promise to supply product at competitive prices through the life of any guaranteed loans. The jury concluded that Chevron's demand that the new contract be at the New York Harbor Barge Buyer price was not improper. The claim of duress in the 1973-74 contract is precluded. The issue of fraud in the inducement of the agreement signed July 11, 1973 persists. That takes us to the supply

agreement for the ensuing contract year.

The 1974-75 Contract

The defendants have moved for judgment dismissing the Bray companies' claims that are based on the 1974-75 contract. The motion is based on the jury's answer to Interrogatory No. 9a.:

> Did the Bray companies violate the terms of the consignment agreement with Chevron under the supply contract for 1973-74 when the plaintiff Northern Oil Company transferred some seven million gallons of No. 2 oil to Green Mountain Petroleum Company in June through August of 1973 without reporting the arrangement to Chevron until later?

To this question the jury answered "Yes."

Chevron responded to the Green Mountain transaction by insisting in the negotiations for 1974-75 contract that the reporting requirement be eliminated and the consignment arrangement be changed to accomplish that end.

Under the terms imposed by Chevron in the 1974-75 contract, the Bray companies were liable for payment for product on a fixed schedule, regardless of when they withdrew product from

storage for subsequent resale. This schedule was based upon their actual withdrawal experience in the 1972-73 season.

The plaintiffs have contended that Chevron's insistence upon the change in terms before entering the 1974-75 contract constituted a wrongful threat, placing the Bray companies under such severe economic pressure that Dana S. Bray's will was overborne to the point where he had no alternative but to sign the contract tendered by Chevron with its more stringent credit terms. The jury's responses to Interrogatory No. 9 expresses its finding that Chevron was justified in making the change in consignment terms, since the Bray companies had violated the prior credit terms. Thus, Chevron's insistence on the new terms could not constitute the "wrongful threat" necessary to sustain the claim that the contract was voidable on the ground of duress.

The plaintiffs argue further that, even if Chevron was justified in changing the credit terms based upon their actions, the change

was nontheless wrongful under the terms of the federal regulations. Such is not the court's analysis of the applicable law.

Changes in credit terms by a supplier are governed by 10 C.F.R. § 210.62(a). This paragraph does provide in part that:

> (N)o supplier may require or impose more stringent credit terms or payment schedules on purchasers than those in effect for that class of purchaser during the base period....

However, this sentence must be read in the context of the entire subsection. Immediately preceding the language just quoted, the paragraph provides:

> Nothing in this paragraph shall be construed to require suppliers to sell to purchasers who do not arrange proper credit or payments for allocated products ....

If a seller is free to eliminate a purchaser altogether for justifiable reasons, surely it would be irrational to require that the seller continue indefinitely to offer the purchaser the original credit terms where the seller elected to carry on the customer relationship despite the breach of the consignment agreement. The construction of the regulations urged by the plaintiffs would produce more purchaser

terminations than one which allowed for some corrective changes in credit terms where necessary to protect the seller from poor credit risks.

In Ruling 1974-10, the FEA made clear that where a change in credit terms is justified, a seller may make such a change. In Crystal Oil Co., 1 FEA Sec. 20,161 (Oct. 8, 1974), the FEA noted that the provisions of 10 C.F.R. § 210.62(a) do not prohibit a supplier from imposing more stringent credit terms provided that sufficient justification for doing so is shown. It is clear that the change in credit terms introduced after the Green Mountain transaction was justified by Bray's violation of the terms of consignment agreement in the prior supply contract.

Nor is the prior approval of the FEA necessary for such a change, as the plaintiffs contend, where the change is occasioned by the poor payment record and credit problems of an individual purchaser, and the responsive change in terms follows

normal business practices of the seller. See Doyle v. Phillips Petroleum Co., 527 F.Supp. 153 (E.D. Ark. 1981), aff'd per curiam, 673 F.2d 1286 (Temp. Emer. Ct. App. 1982); Vold v. Marathon Oil Co., 407 F.Supp. 1011, 1016-18 (W.D.Ky. 1975); William Joseph Kott, 1 DOE Sec. 82,502 (Oct. 14, 1977). The burden of proof in such a case to show that the change in credit terms was not a normal business practice of the seller falls upon the delinquent purchaser. E.g. Doyle v. Phillips Petroleum Co., supra, 527 F.Supp. at 157. The plaintiff in this case has not made the necessary showing.

The court holds, based upon the special verdicts, that the 1974-75 change in credit terms was fully justified and did not contravene the federal regulations. The 1974-75 contract is therefore not voidable by the plaintiffs on this basis.

The evidence on this subject clearly establishes that the Green Mountain transaction which was jndertaken by Northern Oil was a breach of the trust that inhered in the consignment. To the extent that the transaction and its proceeds

were concealed by the consignee, the deal exceeded "the morals of the market place" and the demands of good faith and fair dealing implicit in every contract. Restatement 2d Contracts § 205; 9A V.S.A. § 2-103 (1)(b).

Overcharge Claims

There remains that part of the defendants' motion for judgment of dismissal of the plaintiffs' claim for overcharges under the federal energy regulations. Again the defendants place principal reliance on the contention that the 1973-74 contract was validly in place on May 15, 1973 and the Bray companies were lawfully classified and charged on the strength of the "as of May 1" starting date.

The court instructed the jury that the parties were at liberty to substitute May 1, 1973, as the effective date to discharge the expiration provision of May 31 in the prior supply agreement of 1968. Viacom International, Inc. v. Tandem Productions, Inc., 368 F.Supp. 1264 (S.D.N.Y. 1974), Gurfein, J. aff'd 526 F.2d 593 (2d Cir. 1975). That is not to say that

where the retroactive date is designed for a fraudulent purpose, it can be given the effect of discharging the parties from a prior valid undertaking. "To the extent that the substituted contract is vulnerable on such grounds as mistake, misrepresentation, duress or unconscionability, recourse may be had on the original duty." Restatement Second Contracts § 279, Comment b. See Thomas v. Johnson, 108 Vt. at 363 supra. The jury was instructed to this effect.

The defendants' motion to dismiss the plaintiffs' claim for overcharges asserts as a matter of law that the 1973-74 contract established the lawful prices in effect on and after May 1, 1973. Since this argument is contrary to the jury's verdict as expressed in Interrogatory No. 5 on the issue of fraud, it cannot prevail.

The defendants' motion does not end there. Chevron further contends that putting aside the agreement signed July 11, 1973, the conduct of the parties in the market place established the

New York Barge Buyer class as the only proper placement for the Bray companies under the Phase IV regulations. In pressing this point, Chevron properly refers to Pacific Supply Corporation v. Shell Oil Company, 697 F.2d 1084 (TECA 1982), to support the proposition that the interpretation of its own regulations by the Department of Energy is entitled to great deference in the courts. The regulations do not restrict the supplier to the particular class of purchasers as a matter of law; rather, the classification function is open to the range of reasonable options. And absent an ongoing commercial relationship on May 15, 1973, the conduct in the market may control. Id. at 1088-89.

The relevant issues of fact concerning Chevron's classifications of the Bray companies were submitted to the jury by way of Interrogatory No. 11. The findings of the jury on the class of purchaser issue were returned to answers 11a.(1) and 11e.(3). The defendants' motion under Rule 58, Fed.R.Civ.P., would have

the court put aside the answers provided in Interrogatory No. 11 to hold as a matter of law that Chevron's classifications of the Bray companies fall within the "range of reasonable options." In effect the argument urges the court to disregard the jury's answers to Interrogatory No. 11 concerning the federal price regulations and dismiss the federal claim under the regulations as a strictly legal question. The result claimed in the motion exceeds the reach of Rule 58. The rule contemplates prompt entry of judgment "upon a special verdict." In the court's view, the provisions of Rule 58(2) were not designed to attack the answers made by the jury in response to specific interrogatories.

The defendants also urge in the alternative that even if the Bray companies should have been placed in a separate class of their own, four transactions that took place between May 1 and May 15, 1973, require dismissal of the plaintiffs' claim for overcharges. The thrust of the argument seems to be that even if the Bray

companies were entitled to separate classification under the terms of the prior contract which was not due to expire until May 31, the four deliveries by Chevron to Bray on May 1 and May 10, 1973 control over the 1966 contract. The contention is that since these shipments and deliveries were based on the New York Harbor Cargo price plus freight, the applicable weighted average price charged and paid for by Bray established the lawful price. Thus it is urged the charges were entirely within the energy regulations and the plaintiffs' claim for overcharges cannot be sustained as a matter of law.

The argument seems to ignore the jury's finding in the answer to Interrogatory No. 11b.

Interrogatory No. 11b.:

> Four shipments of Chevron No. 2 oil and kerosene were made by tank car from Bray's Terminals; Rensselaer, New York facility to Bray Oil and Northern Oil in early May of 1973. Prior to those shipments, had Chevron and the plaintiffs agreed that the

terms of those shipments would be pursuant to a New York Harbor Barge price, plus freight?

Yes _____ No X

In the presence of this answer the four shipments, upon which the defendants rely, cannot do service as binding contracts within the requirement of 10 C.F.R. § 212.31. Neither can the shipments and deliveries be considered as binding oral modifications of the prior supply contract for the term ending May 31, 1973. For the limited purpose of the instant motion, the defendants assume the earlier contract to have been in effect on May 15, 1973.

In dealing with this subject, the defendants rely on Litchfield Oil Co., Inc., FEA p. 80533 (Jan. 25, 1977). There the supplier, after invoicing its purchaser at price in effect on May 15, made and credited the purchaser with a downward credit adjustment retroactive to the freeze date, apparently in keeping with a variable written sales contract entered in May, 1971. Litchfield gave notice of termination

of this contract effective June 9, 1973. The remedial order held Litchfield as the supplier to its retroactive credit adjustment.

According to the jury's answer to Interrogatory No. 11b., the transactions, upon which Chevron relies, were not pursuant to binding contracts.

For the purpose of considering the particular answers provided by the jury which underlie the defendants' motion for entry of judgment of the complaint, the court regards the written responses as the special verdict of the jury under Rule 58, Fed.R.Civ.P. The jury's answers to the interrogatories on the liability phase of the litigation fail to establish that the plaintiffs are entitled to no relief under Rule 58. The nature and extent of the plaintiffs' entitlement cannot be determined with the exactness required by Rule 58.

Beyond that, the defendants have attacked other special verdicts relating to the 1973-74 contract, the mutual releases executed by the

parties in 1975 and the federal regulations. They request that the challenged answers be set aside and, in the alternative, seek a new trial on these issues. These motions must be decided before judgment can be properly entered under Rule 58. Murphy v. Lehigh Valley Railroad Co., 158 F.2d 481, 485 (1946).

As noted earlier in the opinion, the plaintiffs also moved under Rule 58(2) for entry of judgment in their favor on the answers to the interrogatories returned by the jury. Without specifying the particular questions or answers, the plaintiffs ask for declaratory relief on eight controlling issues. The motion concludes:

> The defendants, Chevron, U.S.A., Inc. and Standard Oil Company of California, are liable to the plaintiffs for all damages arising from the defendant's wrongful acts, including the before-stated fraud, duress and violations of public policy and sustained during all relevant periods commencing May 1, 1973, to the date of final judgment. Said damages to be determined

by subsequent Jury trial.

The various grounds specified in the plaintiffs' motion are not separately briefed; the plaintiffs apparently rely on their written argument in opposition to the defendants' motion for entry of judgment dismissing the complaint.

As the final request for judgment suggests, final judgment cannot be entered until the claim for the actual damages caused by the defendants' alleged wrongful acts has been determined. Causation of loss is an essential ingredient to an action at law for fraud. Restatement 2d Contracts § 525. "The tort lies in causing loss." Id. § 871, Comment b. Crowley v. Goodrich, 114 Vt. 304, 308 (1945) (Recovery limited to the net amount of money lost as a result of fraud practices on the victim); Thomas v. Johnson, 108 Vt. supra at 369 (Causal connection between the fraudulent representation and the damages claimed to have been suffered).

The only cause of Bray's damage shown by the evidence is the false reason given by Chevron's

representative for making the contract signed on July 11, 1973, retroactive to May 1. This statement, standing alone, was harmless; when measured by the effect of the price roll back to May 15, imposed by the Phase IV regulations, the consequent damage under the applicable federal statutes and regulations could be substantial. In other words, the damages suffered by the plaintiffs must be equated to the overcharges under the relevant federal law. The plaintiffs' recovery on the facts established by the evidence and the special verdicts confine the damages to that provided in the Economic Stabilization Act, 12 U.S.C. § 754(a)(1).

The court is mindful that the jurisdictional grant under the remedial provisions of § 210(d), Economic Stabilization Act, "for any legal wrong because of any act or practice arising out of this title ..." may include a common law action for fraud and deceit. See Newman Oil Co. v. Atlantic Richfield Co., 597 F.2d 273, 279 (TECA 1979). However, Judge Hoffman's opinion goes on to explain:

> We interpret this language (§210(a) of the ESA) as being sufficiently broad to encompass a cause of action arising from a fraudulent representation intended to induce one to forego his rights under the EPAA.

Id.

The evidence presented on the issue of liability for fraud was structured entirely within this legal framework. The damages recoverable for overcharges will be measured by the applicable federal regulations and the remedy provided under § 210(a) of the ESA. Whether the period of the overcharges will be limited to the product sold after the mutual releases were executed on October 14, 1975, or relate back to May 15, 1973, must of necessity await resolution of the subsequent motions by SoCal and Chevron to set aside certain special verdicts or, in the alternative, to grant a new trial.

Written arguments have now been filed addressing the latter motion. The clerk will enter the court's decision denying the cross motion for entry of judgment under Rule 58, Federal Rules of Civil Procedure. Hearing on the

remaining motions will be scheduled at Rutland on August 23, 1983, at 9:30 a.m.

It is SO ORDERED.

Dated at Rutland, in the District of Vermont, this 27th day of July, 1983.

/s/ James S. Holden
James S. Holden
U.S. District Judge

FOOTNOTES

1/ On July 10, 1973, H.L. Severance, an employee of Standard Oil of California, sent a telexed message to persons at SoCal's operating subsidiaries, Severance requested that the recipients provide estimates of anticipated reductions in existing projections of revenue in the alternative events of (1) a price freeze effective June 13, 1973, continuing throughout 1973,and (2) a retroactive price freeze and rollback effective May 15, 1973, based upon prices in effect during the first 15 days of May, 1973. The data was required by 9:00 a.m. on July 12, two days after the Telex was sent. Plaintiffs' Exhibit 604.

Plaintiffs contended throughout this action that this Telex, in combination with Eric Pfefferkorn's precipitous trip to Burlington to obtain the execution of the contract documents by Dana S. Bray, supports the inference that Chevron had advance knowledge of the freeze date. The jury found that Chevron did not have such actual knowledge. This does not, however, defeat an inference that Chevron had reason to believe that a rollback to May 15 prices was a strong possibility when Phase IV finally became effective.

2/ The letter of rescission of the NOPV, written by William J. Costello, area manager for the FEA, to Eric Pfefferkorn, reads as follows:

> This letter will advise you of the rescission of the Notice of Probable Violation (NOPV) issued to CHEVRON (CHEVRON) OIL COMPANY on October 25, 1974.
>
> The NOPV indicated that the subsequent change in 1974 of the credit terms

enjoyed by BRAY OIL COMPANY on May 15, 1973 constituted a probable violation of 10 C.F.R. 210.62(a).

The sole basis for FEA's establishment of the May 15, 1973 credit terms was a contract between CHEVRON and the BRAY OIL COMPANY, dated May 1, 1973. In a letter dated June 22, 1973 from you to R. Case Prime, attorney for BRAY, you stated: "We have been operating without any agreements since May 1, 1973. This arrangement is causing serious confusion internally in processing barge shipments, payment of invoices, and all other arrangements. It is of primary importance that new contracts be executed at the earliest possible date". (sic)

In light of that correspondence and supporting statements from BRAY officials, FEA determines that the aforementioned contract alone is not dispositive of the credit terms in effect on May 15, 1973.

Accordingly, without prejudice to any further remedial action as may become appropriate or necessary in this matter, FEA, Region I, hereby rescinds, effective immediately, the Notice of Probable Violation issued to CHEVRON on October 25, 1974.

Plaintiffs' Exhibit 994 (emphasis added).

3/ The text is omitted because petitioners have included Interrogatory No. 5 elsewhere in the petition.

AMENDED JUDGEMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

DISTRICT: VERMONT

NORTHERN OIL COMPANY, INC.,
BRAY OIL COMPANY, INC.,
NORTHERN TERMINALS, INC.,
and DANA S. BRAY

DOCKET NUMBER
CIV. 78-231

vs

STANDARD OIL COMPANY OF CALIFORNIA and CHEVRON U.S.A., INC.

NAME OF JUDGE OR MAGISTRATE
JAMES S. HOLDEN
U.S. SENIOR DISTRICT JUDGE

__ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

_x_ Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The Plaintiffs are entitled to recover from the Defendants Standard Oil Company of California and Chevron U.S.A., Inc. the amount of $210,000 for overcharges, together with interest payable solely on the overcharges at the rate of 8.5% from August 1, 1976 thru

April 28, 1980 at the rate of 12% thereafter until April 10, 1984, with interest amounting to $163,474.87, bringing Plaintiffs' recovery to $583,474.87. An additional $210,000 for willful imposition of overcharges will be assessed by way of statutory sanctions against Defendant Chevron U.S.A., Inc..

The Court will award the Plaintiff reasonable attorneys' fees and expenses to be apportioned at one-half the total of such expense, to be determined in post-judgment supplemental proceedings to be later scheduled by the Court.

The Defendant Chevron U.S.A., Inc. is entitled to recover from the Plaintiffs on its counterclaim the amount of $1,805,751.54 together with interest, payable at the above rates, amounting to $1,468,231.34 for a total recovery of $3,273,982.88.

Clerk: LEONARD W. LAFAYETTE

DATE:
Apr. 10, 1984

(By) Deputy Clerk

/s/ Richard P. Wasko

Economic Stabilization Act, §210(a),(b),(c)

§210. Suits for damages or other relief

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge. Provided, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of presentation of such claim.

(c) For the purposes of this section, the term "overcharge" means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the

applicable ceiling under regulations or orders issued under this title.

Emergency Petroleum Allocation Act

15 U.S.C. §753(b),(1),(2)

Requisite areas of coverage for regulations, price regulations; unobtainability or curtailment of other fuels; limitations on pricing policy

(b)(1) The regulation under subsection (a) of this section, to the maximum extent practicable, shall provide for--

(A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent

refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of--

(i) fuels, and

(ii) minerals essential to the requirements of the United States,

and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

(2) In specifying prices (or prescribing the manner for determining them), the regulation under subsection (a) of this section --

(A) shall provide for a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and

refined petroleum products at all levels of distribution from the producer through the retail level;

(B) (i) shall not permit any net crude oil cost increases--

(I) which are incurred by a refiner during the calendar month immediately preceding the effective date of this paragraph, or in any month thereafter, and

(II) which are not passed through in prices charged pursuant to such regulation in the 2 calendar months following the calendar month in which such crude oil cost increases were incurred,

to be passed through by such refiner in any month subsequent to the 2 calendar months following the calendar month in which such crude oil cost increases were incurred, unless the President makes the findings specified in clause (ii)(II)(aa), and such passthrough is consistent with the requirements specified in clause (ii)(II)(bb).

(ii) shall not permit the passthrough in

any month of--

(I) any net crude oil cost increases incurred by a refiner not later than the last day of the calendar month which begins two months prior to the effective date of this paragraph and not passed through by the end of the last calendar month prior to the effective date of this paragraph unless such passthrough is not in excess of 10 percent of the total amount of such increased crude oil costs not passed through as of the last day of the last calendar month prior to the effective date of the amendment promulgated under section 757(a) of this title; and

(II) any net crude oil cost increases incurred by a refiner after the effective date of this paragraph, which net crude oil cost increases were not passed through within the 2 calendar months following the calendar month in which such crude oil cost increases were

incurred, unless--

(aa) the President finds, and reports to the Congress with respect to such findings, that a passthrough of such crude oil cost increases is necessary to alleviate the impact on refiners, marketers, or consumers of significant increases in costs, to provide for equitable cost recovery consistent with the attainment, to the maximum extent practicable, of the objectives specified in paragraph (1), or to avoid competitive disadvantage; and

(bb) such passthrough in any month of such crude oil cost increases is not in excess of 10 percent of the total amount of such crude oil cost increases as of the end of the calendar month in which the effective date of this paragraph occurs or any month thereafter;

(C) shall provide for the use of the same date in the computation of markup, margin, and posted price for all marketers or distributors

of crude oil, residual fuel, and refined petroleum products at all levels of marketing and distribution; and

(D) shall not permit more than a direct proportionate distribution (by volume) to Number 2 oils (Number 2 heating oil and Number 2-D diesel fuel), aviation fuel of a kerosene or naphtha type, and propane produced from crude oil, of any increased costs of crude oil incurred by a refiner; except that the President may, by amendment to the regulation under subsection (a) of this section or by order, permit deviation from such proportionate distribution of costs, if the President finds that refinery operations justify such deviation and further finds that to permit such deviation is consistent with the attainment of the objectives in paragraph (1) and would not result in inequitable prices for any class of users of such product.

As used in this paragraph, the term "effective date of this paragraph" means the effective date specified in section 402(b) of the

Energy Policy and Conservation Act.

Freedom Information Act
5 U.S.C.S. §552(b),(7)

(b) This section does not apply to matters that are--

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures,

or (F) endanger the life or physical safety of law enforcement personnel;

Price Rule (Refiners)
10 C.F.R. §212.83(a),(1),(2),(3)

§212.83 Price rule.

(a) General rule. (1) Rule. A refiner may not charge to any class of purchaser a price for a covered product in excess of the maximum allowable price except as provided in paragraph (a)(4) of this section.

(2) Special sales on May 15, 1973. In computing the maximum allowable price, a firm may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973.

(3) Imputed prices. If no transaction occurred with respect to a particular product on May 15, 1973, the most recent day preceding May 15, 1973 when a transaction occurred shall be used for purposes of computing the maximum allowable price. If a refiner first offered an item for sale after May 15, 1973 and prior to the effective date of this paragraph, the first day when the item was offered for sale shall be used for purposes of computing the maximum allowable price.

§205.202 Violations.

Any practice that circumvents or contravenes or results in a circumvention or contravention of the requirements of any provision of this chapter or any order issued pursuant thereto is a violation of the DOE regulations stated in this chapter.

Normal Business Practices
10 C.F.R. §210.62(c)

§210.62(c)

Any practice which constitutes a means to obtain a price higher than is permitted by the regulations in this chapter or to impose terms or conditions not customarily imposed upon the sale of an allocated product is a violation of these regulations. Such practices include, but are not limited to, devices making use of inducements, commissions, kickbacks, retroactive increases, transportation arrangements, premiums, discounts, special privileges, tie-in arrangements, trade understandings, falsification of records, substitution of inferior commodities or failure to provide the same services and equipment previously sold.

Production or Disclosure Prohibited
10 C.F.R. §202.22

§202.22 Production or disclosure prohibited unless approved by an appropriate FEO official. No employee or former employee of the FEO shall, in response to a demand of a court or other authority, produce any material contained in the files of the FEO or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without prior approval of the General Counsel of FEO.

Confidential Information
10 C.F.R. §205.201(e)

§205.201

(e) Confidentiality. Information received in an investigation under this section, including the identity of the person investigated and any other person who provides information during the investigation shall unless otherwise determined by the FEA, remain confidential under the investigatory file exception to public disclosure.

Received
Oct.29 1974
G.J.Schimpf

FEDERAL ENERGY OFFICE
150 Causeway Street
Boston, Massachusetts 02114

October 25, 1974

Chevron Oil Company
1200 State Street
Perth Amboy, New Jersey 08861

Subject: Notice of Probable Violation

Dear Sir:

An examination has been conducted by the Federal Energy Administration to determine your compliance with Section 210.62 of the Federal Energy Regulations in the sale of petroleum products, on a credit basis, to Bray Oil Company, Inc. of Glen Falls, New York and Burlington, Vermont subsequent to May 1, 1974.

Section 210.62(a) states in part, "no supplier may require or impose more stringent credit terms or payment schedules on purchasers than those in effect for that class of purchaser on May 15, 1973".

Reference is hereby made to your letter as of May 1, 1973 to Bray Oil Company, Inc.

which outlines the credit terms to be applied for the one year period ending April 30, 1974. It states, "With respect to sales from consigned Heating Oil and Kerosene stocks ..... the payments for withdrawals must be received by us within 20 days of the close of the withdrawal period". These credit terms were modified as outlined in Exhibit A of your letter as of May 1, 1974 to Bray Oil Company, Inc. Additionally, a discount of 1% on purchases was modified to conform to the revised payment schedule.

The aforementioned modifications constitute a probable violation of the Federal Energy Regulations.

You may file a reply within ten days of receipt of this Notice of Probable Violation. This reply must be in writing. You may also request an appointment for a personal appearance which must be held within the 10 day period provided for reply. You may be represented or accompanied by counsel at the personal appearance.

Replies should be mailed to:

Appeals Staff
Federal Energy Administration
150 Causeway Street
Boston, MA 02114

The lower left hand corner of the envelope should be marked - "Reply-Notice of Probable Violation".

If you do not reply within the time allowed, the violation will be considered admitted as alleged and the Federal Energy Administration may issue an appropriate Remedial Order.

If the Federal Energy Administration considers it appropriate or advisable to compromise any civil penalties for which you may be liable, the General Counsel of the Federal Energy Administration or his delegate will advise you, pursuant to 10 CFR 205.202.

You may contact this office at telephone number (617) 223-5207.

Sincerely,

/s/ Thomas Hagen

Thomas Hagen
Area Manager

FEDERAL ENERGY OFFICE
150 Causeway Street
Boston, Massachusetts 02114

July 24, 1975

Mr. Eric Pfefferkorn
CHEVRON OIL COMPANY
1200 State Street
Perth Amboy,
NEW JERSEY 08861

In re: Rescission of Notice of Probable Violation

Certified Mail
Return Receipt Requested

Dear Mr. Pfefferkorn:

This letter will advise you of the rescission of the Notice of Probable Violation (NOPV) issued to CHEVRON (CHEVRON) OIL COMPANY on October 25, 1974.

The NOPV indicated that the subsequent change in 1974 of the credit terms enjoyed by BRAY OIL COMPANY on May 15, 1973 constituted a probable violation of 10 CFR 210.62(a).

The sole basis for FEA's establishment of the May 15, 1973 credit terms was a contract between CHEVRON and the BRAY OIL COMPANY, dated May 1, 1973. In a letter dated June

22, 1973 from you to R. Case Prime, attorney for BRAY, you stated: "We have been operating without any agreements since May 1, 1973. This arrangement is causing serious confusion internally in processing barge shipments, payment of invoices, and all other arrangements. It is of primary importance that new contracts be executed at the earliest possible date".

In light of that correspondence and supporting statements from BRAY officials, FEA determines that the aforementioned contract alone is not dispositive of the credit terms in effect on May 15, 1973.

Accordingly, without prejudice to any further remedial action as may become appropriate or necessary in this matter, FEA, Region I, hereby rescinds, effective immediately, the Notice of Probable Violation issued to CHEVRON on October 25, 1974.

Sincerely yours,

/s/ William J. Costello

FEDERAL ENERGY
ADMINISTRATION
450 Main St. - Rm. #405
Hartford, CONN. 06103

WILLIAM J. COSTELLO
Area Manager
Regulatory Programs
Division

No. 84-1854

Office-Supreme Court, U.S.
FILED
JUN 28 1985
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHERN OIL COMPANY, INC., BRAY OIL COMPANY, INC., NORTHERN TERMINALS, INC., and DANA S. BRAY,

Petitioners,

v.

STANDARD OIL COMPANY OF CALIFORNIA and CHEVRON U.S.A. INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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Counsel for Respondents

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June 27, 1985

BEST AVAILABLE COPY

Questions Presented

1. Is a release of claims arising under the Emergency Petroleum Allocation Act (EPAA) that had been negotiated over the course of four months by sophisticated commercial parties, each represented by counsel, enforceable as against a claim of fraud where the refiner allegedly stated falsely to its distributor that the Federal Energy Administration (FEA) had rejected the distributor's claims but

> (a) where the distributor and its attorney had made no effort to verify the refiner's statement with the FEA in the six weeks prior to the execution of the release, and
>
> (b) where the distributor and its attorney had met and discussed related matters with the FEA three weeks after the statement had allegedly been made and three weeks prior to the execution of the release and, despite that opportunity, had not asked the FEA to verify or explain the refiner's statement?

2. Does a release bar recovery under the EPAA of overcharge damages allegedly incurred after the release had been signed where the claim of overcharge was based upon an alleged misclassification of the purchaser and where the alleged misclassification (and deliveries at a price based on that classification) had been made and disputed well before the release had been signed?

List Pursuant to Sup. Ct. R. 28.1 of Affiliates and Subsidiaries (Except Wholly-Owned Subsidiaries) of Chevron U.S.A. Inc. and Chevron Corp.

Respondent Chevron U.S.A. Inc. is a wholly-owned subsidiary of Chevron Corp., the successor corporation to respondent Standard Oil Company of California.

The following is a list of affiliates and subsidiaries (except wholly-owned subsidiaries) of Chevron Corp.:

AMAX Inc.

American Overseas Petroleum Limited

Caltex Petroleum Corporation

Irving Oil Limited

P.T. Caltex Pacific Indonesia

UNC Resources, Inc.

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No. 84-1854

IN THE

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NORTHERN OIL COMPANY, INC., BRAY OIL COMPANY, INC., NORTHERN TERMINALS, INC., and DANA S. BRAY,

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STANDARD OIL COMPANY OF CALIFORNIA and CHEVRON U.S.A. INC.,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Statement of the Case

In the summer of 1975 petitioner Bray Oil Company, Inc. (Bray Oil) sought to obtain from respondent Chevron U.S.A. Inc. (Chevron) a new supply contract for home heating oil.[1] At that time the parties were in the midst of

[1] Petitioners' statement of facts contains a significant number of omissions and distortions, including errors with respect to facts relevant, if at all, only to the underlying EPAA claims, not to the issues concerning the release that are presented by the petition. Rather than correct each of those omissions and distortions here, we refer to the opinion of the Temporary Emergency Court of Appeals (TECA), which sets forth a more balanced statement of the facts necessary to understand the issues presented by the petition.

a dispute concerning the legality under regulations issued under the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. §§ 751 *et seq.*, of prices and credit terms in their prior two contracts.[2] Bray Oil contended that Chevron's price since August 19, 1973, had been too high because, it claimed, in determining the maximum allowable price for Bray Oil under the regulations, Chevron had improperly grouped or "classified" Bray Oil in the fall of 1973 or earlier with another class of Chevron customers that was being charged a higher price on the regulatory base date. *See* 10 C.F.R. §§ 212.82, 212.83(a). Bray also contended that it was entitled to be placed on consignment rather than on a fixed payment schedule and, accordingly, had refused to pay Chevron approximately $4 million due under the fixed payment schedule in the previous contract between the parties. Because of Bray Oil's refusal to pay its past-due account, Chevron was unwilling to extend further credit to Bray Oil.[3]

Petitioners informally prodded the Federal Emergency Administration (FEA) to issue a Notice of Probable Violation (NOPV), which was the first step in launching an investigation into the dispute over credit terms. During

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[2] The regulations were originally issued on August 19, 1973, pursuant to the Economic Stabilization Act, 12 U.S.C. § 1904, note (1980 Supp.), and then reissued under the EPAA with virtually no changes by the Federal Energy Office in January of 1974. 39 Fed. Reg. 1924-61 (1974).

[3] In attempting to justify the large past-due amount, petitioners omit from their Statement of the Case the fact that the fixed payment schedule had been proposed by Chevron and accepted by Bray after Chevron had discovered that Bray Oil had been cheating on consignment by selling over $1 million of Chevron product to Green Mountain Petroleum Co. without having reported such sales in accordance with the consignment agreement. (*See* Petitioners' Appendix (PA) 169-74). Petitioners also fail to mention that the jury found that the Green Mountain scam had constituted a breach of the consignment agreement, *see* Special Verdict 9A, PA 139, and that, based on that finding, the district court had concluded that the change in credit terms had been justified. PA 171-74.

a period of more than six months petitioners repeatedly supplied the FEA with information designed to fuel that investigation.[4] Petitioners' attorney still hoped, however, to achieve a negotiated resolution of the dispute and adopted a strategy of operating behind the scenes rather than of filing a formal complaint with the FEA. *See* PA 92-93.

Chevron, after having conducted its own internal review, concluded that petitioners' claims were baseless and were at best a negotiating ploy. Nevertheless, because of the enormous sum that Bray Oil was refusing to pay for product already delivered and because of the uncertainty created by petitioners' persistent challenges to Chevron's class of purchaser determination and the change in credit terms, Chevron was reluctant to enter into a further contract with Bray Oil unless the parties could put those disputes behind them. Accordingly, beginning in June of 1975 Chevron repeatedly requested that a release be given in connection with any new contract.

Between June 10, 1975, and October 14, 1975, the parties negotiated with respect to the new supply contract and the release. Petitioners at times offered a release if they could obtain the right concessions from Chevron in return.

Bray Oil's primary negotiator was Dana Bray, the president and sole shareholder of Bray Oil, Northern Oil and Northern Terminals. Mr. Bray was a shrewd negotiator and an experienced businessman with wide-ranging real estate holdings. *See* PA 91. For more than 20 years he had negotiated contracts with Chevron, often on extremely favorable terms. At all times Bray Oil was represented in the 1975 negotiations by its attorney, Mr. O'Brien, a former Vermont judge.

---

[4] In fact, petitioners and their attorney were the only source, other than Chevron, of information obtained by the FEA during its investigation.

The negotiations produced a settlement under which Chevron agreed to supply Bray Oil for another year on 30-day credit terms (rather than on a cash before delivery basis), to accept an interest-free promissory note with an extended payment schedule for the then past-due amount of $3 million (rather than requiring immediate payment), and to forego its demand for 9% interest on the past-due amount. As part of that settlement the parties agreed to continue the price terms of the previous two contracts and to exchange mutual releases. Bray Oil executed the new supply contract and the mutual release on October 14, 1975. Chevron believed that as a result of the settlement, the parties had finally placed their differences behind them and could continue to do business on a clean slate.

At the conclusion of the 1975-76 heating season, when federal price controls on middle distillates were lifted, Mr. Bray, then 67 years of age, sold his heating oil business. Mr. Bray refused to pay Chevron the approximately $1.1 million that Bray Oil owed for product, much of which had been delivered to Bray Oil under the new credit terms granted in the 1975-76 contract, and nearly $800,000 that was still owed under the interest-free promissory note.

When Chevron learned that Mr. Bray was selling his business, Chevron commenced a collection action against petitioners in state court on August 2, 1976. In response to that collection action, petitioners asserted that Bray Oil had been overcharged and that the 1975 settlement agreement was invalid on grounds of fraud (and duress).[5]

Petitioners' fraud claim was essentially as follows: Mr. Pfefferkorn of Chevron wrote a letter to Mr. Bray on August 28, 1975, noting in passing that the NOPV had been "formally rescinded," which was admittedly the fact, and then allegedly phoned Mr. Bray on the same date and

[5] Petitioners subsequently filed this federal action based on their overcharge claims under the EPAA and obtained a stay of Chevron's collection action in state court.

stated that the Region I office of the FEA had rejected the claims made by Bray Oil and had cleared Chevron's pricing and credit terms. In fact, the FEA had not reached petitioners' claims on the merits, with the rescission of the NOPV having meant only that the investigation had been suspended, not terminated. Petitioners claimed that the rescission letter and the alleged statement, made six weeks before the release was signed, caused them to lose confidence in prevailing on their claims against Chevron and to agree to the settlement.

Whether the oral statement was ever made was vigorously disputed at trial.[6] There can be little dispute, however, about the following facts relevant to the fraud allegation.

Document after document in petitioners' files established that before August 28, 1975, the FEA had advised petitioners and their attorney that it lacked the manpower to make Bray Oil's case for it (if there were any such case to make) and that it would not consider petitioners' claims on the merits unless petitioners should first file a formal complaint. *See, e.g.,* PA 79, 95. No such complaint was ever filed.

Moreover, after the date of the alleged statement petitioners' actions actively demonstrated that, contrary to what Mr. Bray later said that Mr. Pfefferkorn had said to him over the telephone,[7] petitioners were fully aware that the FEA had not ruled against them on the merits and that the FEA remained fully available to them as a forum. Though at trial Mr. Bray professed to have been "shocked" at the alleged news received from Mr. Pfeffer-

---

[6] It is assumed here, only for purposes of argument, that the statement was made. The facts recited below strongly suggest, however, among other things, that the statement was never made.

[7] Mr. Bray had testified repeatedly before trial that, long before August 28, 1975, he had come to distrust any statement made to him by Mr. Pfefferkorn. *See* PA 93.

korn, petitioners had never contacted the FEA to learn the basis for the FEA's decision, whether the FEA's investigation would continue or whether an appeal was available. Instead, within days after the alleged statement, petitioners were still preparing to file with the FEA the formal complaint against Chevron that the FEA had advised them before rescinding the NOPV would be a prerequisite to any further investigation and a determination on the merits by that agency.

For example, on September 5, 1975, Mr. O'Brien wrote to Mr. Bray, not to suggest that filing a formal complaint with the FEA would now be a futile act but, to the contrary, to advise Mr. Bray as to the options for selecting an attorney to prosecute that complaint. Again, in a letter to Mr. Bray dated September 9, 1975, Mr. O'Brien, after analyzing the relevant law, stated his opinion that petitioners had valid claims under the regulations and concluded:

> "I, therefore, feel somewhat stronger in having this matter resolved by the FEA and, so long as the mandatories continue, see no particular risk to proceeding with the complaint. In view of the present situation, you hardly have any alternative." PA 94.

Moreover, Mr. Bray conceded the point at trial:

> "Q. So that more than 10 days after you supposedly heard that the FEA had ruled against you on the merits, your attorney is still advising you full speed ahead on the formal complaint with the FEA, correct, sir?
>
> "A. Absolutely, yes."

On September 17, 1975, representatives of Chevron, Bray Oil, the FEA and state energy officials met in Albany and discussed in part Chevron's request for a release as a condition of a new supply contract. *See* PA 84-85. Despite the

opportunity provided by that discussion, petitioners did not ask the FEA attorneys present the basis for the FEA "decision" in favor of Chevron on the merits or whether the FEA's investigation would continue. Rather, Mr. O'Brien, further confirming the Bray belief that the FEA had never ruled on the merits of petitioners' claim, used the opportunity to present to the Regional Counsel of the FEA office that had rescinded the NOPV petitioners' version of the Green Mountain transaction (the transaction that was a principal part of Chevron's defense to the NOPV). Mr. O'Brien considered the FEA's reaction to be favorable.

Further acknowledgment of that belief came on September 23, 1975, when Mr. Bray wrote to his bank, The First National Bank of Glens Falls, that he still expected to obtain relief against Chevron on his federal claims:

> "Of course, it goes without saying that if Chevron is forced to pay us back for overcharges and other things, we will pay you in full immediately." PA 95.

Mr. Bray's banker testified that Mr. Bray had advised him both before and after September 23, 1975, "that FEA had not resolved the dispute that he had with Chevron" and that Mr. Bray expected to prevail on his claims.

Mr. Bray testified at trial that he entered into the settlement in October 1975, not because he had come to lack confidence in his claims against Chevron but because the terms of the settlement would buy him the time he felt he needed to make a favorable sale of his business:

> "Q. As I understand it, you had some advice from Mr. O'Brien, according to the information in those letters [of September 5 and 9], that he felt that you had a valid case in terms of a claim either in the courts or through the FEA against Chevron, correct?
>
> "A. Yes. *We felt we had a valid claim and I didn't dispute that fact, but I needed time* because by the

> time I got into this material I realized Chevron didn't want me any more, didn't want our companies' business any more, and I had to stay going if I was going to sell out and realize anything from my properties." (Emphasis added.)

Against the background of that record, the district court concluded that there was insufficient evidence in the record from which a jury could have found by clear and convincing evidence four elements of petitioners' fraud claim: that petitioners did not know the true facts (Special Verdict 2d), that the true facts were not open to petitioners' knowledge (Special Verdict 2e), that the alleged statement was material (Special Verdict 2f), and that petitioners had relied on the alleged statement in releasing their EPAA claims (Special Verdict 2g). In affirming the district court's ruling with respect to Special Verdict 2g, TECA ruled that because petitioners had the opportunity (including a face-to-face meeting) to learn from the FEA that the FEA had not reached the merits and that its investigation was still open, petitioners, in settling their EPAA claims, had no right as a matter of law blindly to rely on the alleged false statement. Having concluded that one of the elements of fraud was missing and that the release was enforceable, TECA did not review the district court's conclusion that the other special verdicts should be set aside, including the district court's determination that the FEA had directly advised petitioners that they had decided not to rule on the merits of petitioners' claims.

TECA also held that the cause of action for an overcharge accrued at the time of the alleged misclassification in 1973, from which it followed (and TECA so held) that petitioners could not claim damages for deliveries received after the release had been signed with respect to such earlier misclassification. Thus, TECA's rulings on the release disposed of the litigation in its entirety.

Reasons for Denying the Writ

As is shown in the following pages, the writ should be denied because the holding by TECA that the release is enforceable and bars each of petitioners' claims is legally sound. Regardless of the correctness of that ruling, however, this case does not meet the minimum standards ordinarily followed by this Court in exercising its discretion to grant *certiorari* review.

This case presents no important federal question. *See* Sup. Ct. R. 17.1(c). The two issues presented by the petition—(1) under what circumstances will a release of EPAA claims be deemed unenforceable? and (2) when does a cause of action for an overcharge accrue under EPAA regulations?—are extremely unlikely to recur. We are unaware of any other pending case in which either of those issues is presented. Consequently, a decision by this Court would have no utility beyond the dispute between these two parties.

The federal issues raised are at best only of historic interest to anyone other than Bray Oil and Chevron. The specific regulations at issue here were lifted as of July of 1976 when heating oil prices were decontrolled, 41 Fed. Reg. 34,008 (1976), and the EPAA expired by its own terms in September of 1981. *See Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 246 (1982). The expiration of the EPAA "signal[led] the end of federal concern in this area". *Tully* v. *Mobil Oil Corp.*, 653 F.2d 497, 502 (Temp. Emer. Ct. App. 1981), *vacated and remanded on other grounds*, 455 U.S. 245 (1982). Indeed, as TECA has recognized, the EPAA is contrary to the current federal energy policy of decontrol. *Gulf Oil Corp.* v. *Dyke*, 734 F.2d 797, 808 (Temp. Emer. Ct. App. 1984), *cert. denied*, 105 S. Ct. 173 (1984). Therefore, review by this Court would promote no existing federal interest.[8]

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[8] Thus, not surprisingly, there appears to be no case since 1980 in which this Court has granted *certiorari* to review an EPAA issue.

No conflict among the circuits exists with respect to either of the issues presented here. *See* Sup. Ct. R. 17.1(a). Since each issue arises under the EPAA and TECA has exclusive jurisdiction over EPAA issues, no other appellate court has addressed, or will address, that issue. Moreover, there is no disagreement even among various panels of TECA with respect to either issue. As is shown below, TECA's decision in this case simply follows the teaching of its own numerous precedents.

Nor does the TECA decision conflict with any applicable decision of this Court. Sup. Ct. R. 17.1(c). Contrary to petitioners' suggestion, this case is not governed by general principles of federal common law announced nearly a century ago by this Court but depends on the interpretation of the policies underlying a particular statute—the EPAA—and of the regulations issued thereunder. This Court has never addressed either of the questions raised by the petition, each of which is a unique EPAA issue.

Accordingly, no issue worthy of *certiorari* review is presented by the petition.

I.

TECA's Ruling That the Release Is Enforceable Is Correct.

In affirming the district court's rejection of petitioners' fraud claim, TECA held that in settling claims under the EPAA, a sophisticated commercial party cannot blindly rely on a false statement by its seller that the FEA has found those claims to lack merit. PA 11. In so doing, TECA followed the principle that it had announced in *Western Mountain Oil Inc.* v. *Gulf Oil Corp.*, 726 F.2d 765 (Temp. Emer. Ct. App. 1983), where TECA had rejected a claim of fraudulent concealment that had been based on an alleged misrepresentation virtually identical to that alleged by petitioners here. *See* PA 11-12. Partly because

of the strong EPAA policy favoring private settlement of disputes under the statute, TECA applied to petitioners' attempt to set aside the release the *Western Mountain* proscription against "blind reliance" upon misrepresentations concerning FEA opinions or actions. *See* PA 12-13.

Petitioners' devote most of their argument on that issue to setting up and tearing down a straw man. Thus, petitioners say that TECA erred by misapplying "the rule" of *Shappirio* v. *Goldberg*, 192 U.S. 232 (1904), which they characterize as "the last controlling statement by this Court of the federal 'access' common law principle of fraud". Pet. at 32. They argue that the evidence "doesn't come close to showing a 'means of knowledge' defense under *Shappirio*". Pet. at 41.[9]

Contrary to the impression petitioners seek to create, TECA did not rely on or even cite *Shappirio* in its opinion. Indeed, *Shappirio* has nothing to do with this case. It does not involve the EPAA or, for that matter, any federal statute. It is simply a pre-*Erie* decision of this Court sitting as the highest court in the District of Columbia in a lawsuit involving a conveyance of real estate. Petitioners' error, of course, is to assume that there is some transcendent body of federal common law that establishes a test for justifiable reliance independent of the particular federal statute under which the substantive claims that have been released arise. The pre-*Erie* holding in *Shappirio*, though consistent with the TECA holding here, is not binding on TECA and provides little, if any, guidance on how TECA, in determining the validity of a release of EPAA claims and in fashioning a legal standard of justifiable reliance, is to harmonize competing EPAA policies.

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[9] Much of the petition asks this Court to examine the sufficiency of the evidence on the issue of justifiable reliance. Whether or not *Shappirio* was binding upon TECA, sufficiency of the evidence issues hardly present the type of question that is worthy of a grant of *certiorari*.

TECA's decision was based not on *Shappirio* but on *Western Mountain* and on the EPAA policy against permitting the easy avoidance of settlements. As TECA stated, "[w]e have made it quite clear, however, that the EPAA embodies a policy favoring private settlement of disputes under the statute." PA 13 (citation omitted). As this Court has recognized, TECA was specially created to be "a court intimately familiar with the intricacies of federal energy regulation. . . ." *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982). Consequently, considerable deference should be given to TECA's interpretation of EPAA policies and the weight to be given competing policies. That being so, it cannot be said that TECA erred by following a rule that prohibits sophisticated commercial parties represented by counsel from seeking to abandon their settlement of past disputes by asserting that they had blindly relied on an adversary's allegedly false statement of the status of FEA action.

Such allegedly blind reliance in this case was even more egregious than that which was considered sufficient by TECA to warrant summary judgment in *Western Mountain*. Not only did petitioners fail to lift a finger to contact the FEA after, as they say, they had been told by the untrusted Mr. Pfefferkorn that their claims had been rejected by that agency, but it is undisputed that on September 17, 1975, three weeks after the statement had allegedly been made and three weeks before the release was signed, their attorney had met face to face with the Regional Counsel of the FEA office that had rescinded the NOPV, had discussed with him certain subject matter underlying the NOPV but had failed to ask whether the FEA had ruled against petitioners on the merits or whether the FEA's investigation was closed. TECA rightly concluded that as a matter of law, when the opportunity to learn the true facts was immediately available to petitioners, they could not reject that opportunity and years later seek to avoid the settlement that they had made of their EPAA claims.

Petitioners argue that FEA regulations concerning pre-clearance of the release of information in FEA files and FEA decisions with respect to the release to third parties of NOPVs while an investigation was pending prevented petitioners from learning the true facts. Pet. at 42-47.[10] Those regulations and decisions were, however, obviously intended only to prevent unauthorized disclosure of confidential information acquired during the investigation and of FEA investigative methods and deliberations, as well as unauthorized disclosure of information that, if disclosed before the investigation had been completed, might unnecessarily damage the reputation of the subject of an investigation.

As noted above, deference should be given to TECA's construction of FEA regulations. In that regard TECA specifically held in this case (PA 13) that the regulations and FEA decisions in question did not preclude the FEA from stating whether an investigation that the agency had told a customer had been commenced and in which the customer had been deeply involved remained open or had been closed. Indeed, it is beyond reason for petitioners, who had supplied all the information upon which the FEA was basing its investigation and who were the only party interested in the NOPV, now to contend that they would have been barred by those regulations from learning the one fact that they claim they needed to know: whether the FEA investigation that they were fueling had been terminated on the merits.[11]

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[10] Perhaps aware that those regulations and decisions were inapplicable to the type of limited information petitioners claim was material here—whether the FEA had ruled on the merits—petitioners failed to raise the existence of those regulations and decisions before either the jury or the district court.

[11] Even though, as TECA held, pre-clearance by the General Counsel would not have been necessary under 10 C.F.R. § 202.22, petitioners made no showing that clearance of the disclosure of such limited information, if requested, would not have been forthcoming.

Petitioners also contend that while federal law should govern the validity of a release of EPAA claims, TECA erred in not incorporating Vermont law as the applicable federal rule of decision. Pet. at 52-59.[12] Once again petitioners would have had TECA ignore the particular federal statute under which petitioners' claims arise and the strong policy underlying that statute that favors private settlements. It was certainly proper for TECA, in order to effectuate that federal policy, to go beyond state law (if indeed it did so) and to apply a more stringent standard of justifiable reliance in determining the validity of a release of EPAA claims negotiated by sophisticated commercial parties represented by counsel.

Petitioners argue finally that even if TECA applied the correct federal rule to uphold the validity of the release as to EPAA claims, a Vermont rule should have been applied to test the enforceability of the release as against petitioners' "independent state law claim of fraud" in connec-

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[12] Although TECA was not required to apply a federal rule that resembled Vermont law, the result would have been the same under Vermont law. Vermont law requires a party claiming fraud to prove that the true facts were not "open to [the] knowlege" of that party. *Union Bank* v. *Jones*, 411 A.2d 1338, 1342 (Vt. 1980); *Anderson* v. *Knapp*, 225 A.2d 72, 76 (Vt. 1966); *Batchelder* v. *Birchard Motors, Inc.*, 144 A.2d 298, 230 (Vt. 1958). Even assuming for purposes of discussion that the open to knowledge standard is more favorable to petitioners than the test for reliance adopted by TECA, the September 17, 1975, meeting between petitioners' attorney and the FEA satisfies either test. Thus, the district court set aside not only Special Verdict 2(g) on reliance but also Special Verdict 2(e), in which the jury had found that the true facts were not open to the knowledge of petitioners.

Moreover, petitioners do not explain why, even if TECA were required to incorporate state law as the federal law governing the release executed by Bray Oil, a New York corporation, it was required to choose Vermont law rather than New York law. As the Second Circuit made clear in *Grumman Allied Industries* v. *Rohr Industries, Inc.*, 748 F.2d 729 (2d Cir. 1984), New York adopts a rule prohibiting blind reliance that is similar to that applied by TECA in this case.

tion with the supply contract dated as of May 1, 1973. Pet. at 60-61. But petitioners had not asserted any independent state law claim of fraud in this case. Their "1973 fraud claim" was part and parcel of their federal claim.[13] That fraud claim was as follows:

On August 19, 1973, the Cost of Living Council (COLC) adopted the Phase IV price control regulations which, as modified in September of 1973, required refiners to place their customers in "classes of purchaser" as of May 15, 1973, and to charge their customers a price no higher than the weighted average price charged in transactions with each class of purchaser on May 15, 1973, plus increased costs. Chevron proceeded to classify Bray Oil according to the terms of the contract that determined the price to Bray Oil on May 15, 1973, which was the contract dated as of May 1, 1973. Petitioners claimed that the as of May 1 contract was procured by fraud because, according to petitioners, Chevron had misrepresented "its reason" to Bray Oil for having desired a May 1 commencement date. According to petitioners, Chevron had wanted that date because it had foreknowledge of the COLC's consideration of May 15, 1973, as a possible base date for the Phase IV regulations, and the new contract would have established a higher price as the base price under those regulations if they were ever adopted.[14] Petitioners claimed that if the as of May 1, 1973, contract were invalid because of fraud, the base price that Chevron used for Bray Oil was too high and, therefore, that Bray Oil was entitled to overcharge damages under the Phase IV regulations from the date

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[13] The relief petitioners sought as a result of the alleged fraud was overcharge damages under Section 210(b) of the ESA and consequential damages under Section 210(a) of that Act.

[14] Actually, the as of May 1, 1973, date had first appeared on the contract drafts beginning in February of 1973, which was at least four months before the COLC even began to consider May 15, 1973, as a possible base date for the Phase IV regulations.

those regulations became effective, which was August 19, 1973.[15]

As is evident, the assertion that the 1973 contract was invalid because of fraud was simply a part of petitioners' overcharge claim. As the district court stated, the alleged misrepresentation in 1973 about Chevron's reason would have been "harmless" but for the federal price regulations. PA 183. Thus the district court held as follows:

> "... Other than the overcharges asserted to be in violation of federal law, the jury was provided with no rational basis for establishing injuries suffered as a consequence of the [otherwise "harmless"] fraud which induced and infected the 1973-74 supply agreement.
>
> "For reasons stated earlier in this memorandum, the court now holds that all claims for recoveries which occurred prior to 1975 have been compromised and released by express agreement of the parties.
>
> "Putting the force and effect of the 1975 release aside for the moment, the full impact of the fraud claimed by the plaintiffs is based on the price controls imposed by virtue of the federal energy regulations. In an uncontrolled market there would have been no injury caused by Chevron's misrepresentation concerning the reason for its insistence on the retroactive

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[15] The statement by petitioners (and by Judge Hoffman, dissenting in part in TECA, PA 19) that "both the district court and the TECA found the 1973 and 1974 contracts invalid" (Pet. at 25) is simply wrong. Because TECA's ruling that the release was enforceable made it unnecessary to reach petitioners' 1973 fraud claim, TECA never addressed respondents' arguments that petitioners had failed to state a claim of fraud as a matter of law, that the jury verdicts compelled dismissal of the fraud claim, that there was no competent evidence of Chevron's alleged foreknowledge of the May 15 base date and that the record precluded a finding that knowledge of that date would have been material to Mr. Bray, who continued to sign contract documents even after he had learned of the May 15 base date. *See* PA 150.

> effective date imposed in the 1973-74 contract. The claims of fraud advanced by the plaintiffs are inextricably tied to the federal regulations. The origin of the claims resides in the federal regulatory scheme; it is within that framewor' that they must be dealt with. It is only within those boundaries that the plaintiffs' award must be measured in terms of the statutory sanctions and litigation costs available under the pertinent provisions of the Economic Stabilization Act." PA 113-14.[16]

Since petitioners have raised no independent state law claim for damages in this case, there was no reason to apply state law to make a second determination of the validity of the release. Therefore, TECA's ruling that the

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[16] Petitioners intimate that if the 1973 contract were to be rescinded, they would have a claim for breach of contract (the supply contract executed in 1968 and due to expire on May 31, 1973) for deliveries made between May 1 and May 31, 1973. The value of that claim, if anything, amounts to $277, the transportation costs borne by Bray Oil on a handful of truck deliveries made in May of 1973. Not surprisingly, petitioners failed to raise any such breach of contract claim in the district court or before TECA.

In addition to their TECA appeal, petitioners also filed a companion appeal with the United States Court of Appeals for the Second Circuit. That appeal was briefed and argued in October of 1984, following which the Second Circuit ordered a stay pending determination of petitioners' appeal from the same judgment to TECA. After the TECA mandate had issued, respondents moved to dismiss the Second Circuit appeal. Petitioners opposed that motion on the ground that they had an independent state law claim not covered by the TECA decision. In that regard petitioners made reference, just as they do here, to a claim for contract damages for deliveries made during May of 1973. On June 18, 1985, the motion to dismiss was granted by the Second Circuit panel before which the appeal to that Court had earlier been argued and to which the motion to dismiss had been referred for decision.

release was enforceable as a matter of federal law was correct and dispositive of the entire case.[17]

II.

The Decison of TECA That All Petitioners' Overcharge Claims Accrued Before the Release Was Signed Is Correct.

The only pricing violation at issue in this case was whether Chevron had violated the Phase IV regulations. As noted earlier, once a customer was classified under those regulations and the May 15 price to the class calculated, the resulting "base price" remained the base price for the class for the duration of the federal price controls on heating oil, *i.e.*, from August 19, 1973, to July of

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[17] Petitioners suggest that the release is "void" because they were unaware of their 1973 fraud claim and, thus, of a basis for their overcharge claim when they signed the release. Pet. at 22-27. But petitioners have identified no portion of the EPAA which precludes the release of unknown claims, and TECA, in rejecting petitioners' position, has instead interpreted that statute as encouraging settlements of EPAA claims of whatever variety. *See* PA 12-13. TECA's view that unknown EPAA claims may be released is consistent with the position taken by other circuits in enforcing releases of other federal claims. Thus, in *Ingram Corp.* v. *J. Ray McDermott, Inc.*, 698 F.2d 1295, 1312 (5th Cir. 1983), a case relied upon extensively by petitioners (Pet. at 27-29), the Fifth Circuit held:

> "... When a release provides that 'any and all claims,' 'past, present, or future' are to be extinguished, a court is required to enforce its provisions both as to known and unknown claims. A contrary result would not contribute significantly to the public policy of encouraging the settlement of differences and compromise of disputes in which the execution and exchange of releases is the common and legally accepted means of consummation."

Moreover, in this case the history of the negotiation of the release made it clear that the parties fully intended to put to rest all accrued EPAA claims so that the parties could operate on a clean slate in future business dealings.

1976. The initial act of classification thus dictated the maximum allowable price to each customer as long as the amount and allocation of increased costs subsequently passed through by the refiner were properly calculated. *See* 10 C.F.R. § 212.83(a).

TECA held in this case that petitioners' overcharge claims accrued in the fall of 1973 when Chevron allegedly misclassified Bray Oil—not each and every time there was a new delivery or agreement to sell. It did so because the sole basis for petitioners' claim of overcharge was the alleged misclassification in 1973.[18] Nor was that holding one with which TECA was breaking new ground. It was simply following five of its own prior decisions, each of which had rejected "the continuing violation" concept in determining when a cause of action accrued under EPAA regulations. *See Lerner* v. *Atlantic Richfield Co.*, 731 F.2d 898, 900-01 (Temp. Emer. Ct. App. 1984); *Western Mountain Oil, Inc.* v. *Gulf Oil Corp.*, 726 F.2d 765, 767 (Temp. Emer. Ct. App. 1983); *Fleetwing Corp.* v. *Mobil Oil Corp.*, 726 F.2d 768, 770 (Temp. Emer. Ct. App. 1983); *Siegel Oil Co.* v. *Gulf Oil Corp.*, 701 F.2d 149, 153 (Temp. Emer. Ct App 1983); *Shell Oil Co* v. *Nelson Oil Co.*, 627 F.2d 228, 236 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 1022 (1980). Three of those decisions—*Western Mountain, Fleetwing* and *Lerner*—had decided precisely the issue in this case and had held that a cause of action for an overcharge based on a misclassification accrues when the act of misclassification occurs, not each and every time there is another de-

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[18] If, for example, petitioners' overcharge claim had been based on an improper application each month of the formula for allocating increased costs in calculating the maximum allowable price, a different result might have been reached on the accrual question. *See Western Mountain, supra* at 767-68. That was not, however, the case here. The claim of overcharge was based exclusively on an allegd misclassification.

livery or sale at a price based on that misclassification.[19] TECA's rejection of the continuing violation concept was also consistent with the EPAA policy that the statute be viewed as a temporary interference with the free market and, thus, that litigation under the Act not continue unnecessarily for years beyond the statute's expiration. *See Gulf Oil* v. *Dyke, supra* at 808.

Since TECA's ruling that the pricing violation, if any there were, had occurred before the release was signed (even assuming that petitioners had suffered some damages from such violation because of deliveries made after the release had been signed), petitioners' contention that the release violated public policy by authorizing future violations is baseless.

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[19] Judge Hoffman, dissenting on that issue, believed that a new cause of action should accrue each time a contract was signed that utilized a price based on the original misclassification. But the regulations give no special significance to the existence of a contract. Indeed, under the mandatory allocation regulations adopted in January 1974, 10 C.F.R. § 211 *et seq.*, supply contracts were rendered entirely irrelevant. Under those regulations a refiner was required to supply its base period customers with base period quantities at controlled prices whether or not there was a contract. Thus, the 1975-76 supply contract, though important because of the significant concessions it made to Bray Oil in return for the release, made no difference whatsoever with respect to Chevron's pricing and supply obligations, which were dictated by federal law.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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84-1854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHERN OIL COMPANY, INC., BRAY OIL COMPANY, INC., NORTHERN TERMINALS, INC., and DANA S. BRAY,
Petitioners,

v.

STANDARD OIL COMPANY OF CALIFORNIA and CHEVRON U.S.A. INC.,
Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The TECA's Ruling That Bray Oil Had The Duty To Test The Truth Of Chevron's Misrepresentation By The Exercise Of Due Diligence Violates EPAA Policy

The TECA has imposed a more stringent fraud standard upon Bray Oil in a closed market than would be required in a free, open market.

The closed market we are referring to is the national energy crisis that began in 1973 and the Emergency Petroleum Allocation Act (15 U.S.C. § 751, et seq.) that was enacted to handle the

crisis. Congress passed the EPAA into law in order to preserve competition and assure equal distribution of critically short oil supplies in a market where the laws of supply and demand were not operating. Conference Report, H.R. Rep. No. 93-628, 93d Cong., 1st Sess. 1973, U.S. Code Cong. Ad. News, pp 2582, 2688. Congress was particularly concerned with protecting small independent refiners and marketers from large intergrated companies. *Basin Inc. v. Federal Energy Administrator,* 552 F.2d 931, 936 ((Temp. Emer. Ct. App.) *cert. denied,* 434 U.S. 821 (1977).[1]

In short, the EPAA expressed the Congressional mandate that large oil companies should be prevented from taking advantage of a national crisis to reap windfall profits and drive comparatively small marketers out of business.

Nevertheless, through fraud, duress and circumvention of federal regulations, this is precisely what Chevron accomplished in its treatment of Bray Oil, as a jury of respondents' peers clearly found. App. 131-143. The district judge found Chevron had overcharged Bray Companies with criminal intent to violate the EPAA. App. 51-60; *Eastern Air Lines v. Atlantic Richfield Co.,* 712 F.2d 1402, 1411 (TECA 1983) ("wilfulness is used in §210 in the criminal sense"). The TECA's ruling that petitioners had a duty to investigate the truth of Chevron's misrepresentation which was designed specifically to obtain the 1975 release from Bray Oil, (App. 11-12) results in obvious derogation of explicit congressional policy concerns.

TECA's "due diligence" requirement not only conflicts with Congressional intent and public policy embodied in the EPAA, it conflicts with all modern principles of common law fraud. Prosser sums it up:

> The last half-century has been a marked change in the attitude of the courts toward the question of justifiable reliance. Earlier decisions, under the influence of the prevalent doctrine of 'caveat

[1] The respondents herein are a prime example of a company with which "Congress was particularly concerned". Even in a free market, integrated oil companies control the vast majority of the production and supply of crude oil as well as refining and distribution of petroleum products.

> emptor' laid great stress upon the 'duty' to protect himself and distrust his antagonist and held that he is not entitled to rely even upon positive assertions of fact made by one with whom he is dealing at arm's length. It was assumed that anyone may be expected to overreach another in a bargain if he can, and that only a fool will expect common honesty. Therefore, the plaintiff must make a reasonable investigation, and form his own judgment. The recognition of a new standard of business ethics, demanding that statements of fact be at least honestly and carefully made, and in many cases that they be warranted to be true, has led to an almost complete shift in this point of view.
>
> It is now held that assertions of fact . . . may justifiably be relied on without investigation, not only where such investigation would be burdensome or difficult, but likewise where the falsity of the representation might be discovered with little effort by means easily at hand.
>
> Prosser, The Law of Torts (1971 ed.)
> Misrepresentation at p. 717-718

A comparison of EPAA policy and Prosser's summary of the demise of the "due diligence" requirement of common law fraud, illustrates the manifest unfairness of the TECA's formulation of federal common law fraud. Should this Court grant this writ, it would be no difficult task to spell out the proper elements of a fraud claim brought under the EPAA. As will be seen, the TECA's decision in this regard will indeed affect litigants now before that court.

The Questions Presented In This Petition Will Recur And In Fact Are Currently Pending Before The TECA

Chevron argues that since the federal questions presented in this petition are "extremely unlikely to recur", review by this Court would serve no purpose. We disagree. The TECA fashioned the federal fraud law in question for the very purpose of future application. The following excerpt from the Oral Argument before the TECA on January 18, 1985, clearly demonstrates this point:

Judge Hoffman: Well, in effect, Judge Holden held that Mr.

Bray had a duty to do some reasonable investigation.

Mr. Davis: This business of a duty to investigate, as I've indicated is clearly contrary to Vermont law. You do not have to do that.

Judge Hoffman: But I don't think it's contrary to the federal common law.

Mr. Davis: There's nothing I know of in federal common law that applies to an action of fraud which says the defrauded party has a duty to go out and find out if he's been defrauded or not. He has a right to rely —

Judge Metzner: *Common law is what this Court says it's going to be.* [emphasis added]. . .

Judge Gignoux: *There is, of course, a line of authority in principle which indicates that where federal statutes are involved, in cases arising in federal statutes, federal common law should be a uniform nature so that the statute and principles are applied in the same way in Vermont or in Oklahoma even though with the state law only two states might differ.* [emphasis added]

This excerpt shows the TECA anticipates the federal common law fraud issue will indeed recur. It cannot be seriously argued the TECA would feel the need to fashion uniform federal law if it were otherwise. Furthermore, in the cases currently pending before the TECA, fraud, misrepresentation, estoppel by misrepresentation and waiver of EPAA rights are all stated issues on appeal.

In the case of *Chevron Oil Company (defendant-appellant) v. James Q. Rainey and Edwin E. Wampler,* TECA Docket No. 9-91, the following issues are presented in Union Oil's revised opening brief:

B. Whether there is substantial evidence in the record to support the jury's refusal to find that Rainey and Wampler procured the AMI purchase agreement through fraud (by misrepresentation and by nondisclosure).

Whether a fraudulently procured contract can be the basis of an award of damages under a claim for curcumvention of a

gasoline supply obligation in violation of Section 205.202 of the Mandatory Petroleum Allocation Regulations (10 C.F.R. §205.202 (1979).

In *MGPC, Inc.* (*plaintiff-appellee*) *v. Department of Energy, et al,* (defendants-appellants, TECA Docket No. 10-52) the following issue is presented by the DOE:

> Alternatively, whether the district court erred in finding that as a result of certain disputed oral representations, that the FEA is estopped from denying MGPC the benefit of the interim-exception relief for the entire period of price controls.

The issue of the validity of a contractual waiver of EPAA regulatory provisions is presented in the case of *Cibro Petroleum Products, Inc.* (*plaintiff-appellees*) *v. SOHIO Alaska Petroleum Company* (*defendant-appellant*), TECA Docket No. 2-47:

> Whether the district court erred in holding that the crude oil supply contract between SOHIO Alaska Petroleum Company ("SOHIO") and Cibro Petroleum Products, Inc. ("Cibro"), did not contain a valid waiver of Cibro's rights under 10 C.F.R. §211.63 to continuation of its supplier/purchaser relationship with SOHIO.

This Court's interest in these federal questions is not purely historical. *Union Oil* and *MGPC* may involve choice of law questions which will induce the TECA to apply the elements of "federal" common law fraud. *Cibro* involves the appeal of a district court determination, (*Cibro Petroleum Products v. SOHIO Alaska Petroleum,* 602 F. Supp. 1520 (1985)) that a contractual waiver of EPAA rights is invalid because it conflicts with certain federal crude oil supply regulations.

Likewise, the federal question of when a cause of action for overcharge accrues, continues to be a popular issue on appeal. Chevron's own citations establish the likelihood that this issue will recur.[2] In addition, the TECA's ruling in petitioners' case

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[2] *Leiner V. Atlantic Richfield Co.,* 731 F.2d 898, 900-901 (Temp. Emer. Ct. App. 1984); *Western Mountain Oil, Inc. v. Gulf Oil Corp.,* 726 F.2d. 765, 767 (Temp. Emer. Ct. App. 1983); *Fleetwing Corp. v. Mobil Oil Corp.,* 726 F.2d 768, 770 (Temp. Emer. Ct. App. 1983); *Siegal Oil v. Gulf Oil Corp.,* 701 F.2d 149, 153 (Temp. Emer. Ct. App. 1983); *Shell Oil Co. v. Nelson Oil Co.,* 627 F.2d 228, 236 (Temp. Emer. Ct. App., *cert denied* 449 U.S. 1022 (1980)

went far beyond all prior decisions. As the dissenting voice of the TECA panel points out (App. 19-21), the majority has decided that a cause of action for overcharges does not accure when a supply contract is executed, but when the first misclassification occurs. This decision not only violates public policy, but has the effect of barring any and all private claims for overcharges brought outside the time requirements of the various state statutes of limitations, which are routinely applied by the federal district courts.

Respondents have asserted the "time of accrual" issue is unlikely to recur and that it is "unaware of any other pending case" in which this issue is presented. This statement is misleading because, as in the case of "federal common law fraud", the "accrual" issue is currently pending before the TECA.

In a case currently on appeal to the TECA, *CPI Crude, Inc., (plaintiff-appellant) v. Thomas D. Coffman, et al. (defendants-appellees)*, Docket No. 5-114, the following issue is presented:

> Whether the district court erred in granting defendants' motions for summary judgment by finding that plaintiff-appellants' private overcharge action, brought pursuant to Section 210 of the Economic Stabilization Act, 12 U.S.C.A. §1904 note, was barred by the *two year limitations period* [emphasis added] found in the pre-amendment version of Tex. Cer. Stat. Ann. Art. 5526(4)?

Consequently, the utility of this Court's review of the federal questions presented in this petition is readily apparent.

Respondents' Recitation of the Facts

Chevron's "Statement of the Case" should be dismissed from consideration by this Court, for compelling reasons.

Petitioners are requesting this Court to review the TECA's mandate which, in crucial part, upheld a judgment notwithstanding the verdict. App. 10. The concern of this Court for a petitioner's right to a trial by jury and denial of that right by an inappropriate grant of J.N.O.V., should not be taken lightly by the respondents.

The evidence must be viewed most favorably to petitioners. *Brady v. Southern Railway Co.*, 320 U.S. 476, 479-80 (1943). It was for the jury to "balance" the evidence, and it cannot be stated too strongly that neither the district judge, nor the TECA, nor Chevron is permitted to present the evidence to its liking. *Brady,* supra.

This, however, is exactly what Chevron has done.

On page one of respondents' opposition brief ("O.B. 1") it is stated that petitioners have significantly distorted the facts, and that to correct these distortions:

> "... we refer to the opinion of the Tempoprary Emergency Court of Appeals (TECA), which sets forth a more balanced statement of the facts necessary to understand the issues presented by the petition."

After that particular "referral" is made, Chevron does not cite the TECA opinion throughout its statement of the case. Instead, Chevron cites the district court's opinions no less than eight times.

Chevron then begins its factual recitation on some indefinite summer's day in 1975 (O.B. 1), without mentioning the FEA had issued a Notice of Probable Violation of Federal Energy Regulations to Chevron on October 24, 1974. Chevron also omits mention of Chevron's first notice of default and its all too clear threat of termination of supply that was sent to Bray Oil three weeks after the NOPV was issued. A second and third notice of default followed (a fourth notice would have automatically terminated supply by the terms of the 1974 contract), and at the end of June 1975, Chevron demanded cash before delivery terms.[3] The Jury's determination that the release was procured by duress, still intact factually,[4] includes the specific finding that "Chevron's threat to continue the plaintiffs on cash before delivery credit terms, was wrongful and without justification". App. 133.

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[3] Chevron concedes that under federal regulations, ". . . a refiner was required to supply its base period customers with base period prices whether or not there was a contract". O.B. 20

[4] The jury may have found that the duress was ratified by Bray Oil in Special Verdict 4(b). App. 134.

Chevron's attempt to make Bray Oil a "party" or otherwise intimately involved with the FEA in its NOPV investigation is a fabrication. See O.B. 2-3. Bray had notified its customers that it intended to change credit terms because Bray Oil's credit terms had been changed by Chevron. A Bray Oil customer complained about this to the FEA. Mr. Salmon of the FEA contacted Bray Oil in order to investigate this complaint. He was informed by Bray Oil that it was forced to change the credit terms to its customers because of the change in credit terms imposed upon Bray Oil by Chevron. Upon being advised by Mr. Salmon that no such change in credit terms could be made under federal regulations, Bray Oil returned to its original credit terms. This is the "informal prodding" Chevron refers to in its opposition brief, which led to FEA's issuance of the NOPV directed at Chevron.

It is quite true that petitioners' did not file a formal complaint before the FEA, although the FEA *suggested* they do so. O.B. 5. However, the evidence is overwhelming that the FEA's advice referred to Chevron's reimbursement for overcharges resulting from the "as of May 1, 1973" contract. This "claim of reimbursement" was outside the scope of the NOPV. There is not one scrap of logically consistent evidence suggesting that the FEA informed petitioners that the NOPV investigation would not continue on course unless such a complaint were filled. Attorney O'Brien's testimony clarifies this point.

(Re-direct):

Q. I don't want to beat the horse to death here. Is there a distinction in your mind, Mr. O'Brien, in answering these various questions relative to a formal complaint versus the NOPV that had been issued previously to Chevron by the FEA.

A. Yes.

Q. And what is that?

A. Well, the NOPV was an action taken by the governmental agency in what I understood was its own motion or initiative, and I did not know, at that point, what the NOPV said, or specifically, what issues it related to. And it was my understanding from what Mr. Costello was urging, was that if we

> wanted to get to some form of calculation of damages, or something of that sort, that that would require some affirmative action on our part.

Chevron's Mr. Pfefferkorn had exactly the same understanding as Attorney O'Brien. In a letter to the Regional Director of the FEA, dated May 12, 1975, Mr. Pfefferkorn expresses his understanding of Mr. Costello's "proposed complaint".

> At the outset of the meeting (April 24, 1975) we were most concerned to learn. . . the FEA was contemplating the issuance of a remedial order against Chevron without what appeared to us to be a thorough investigation.
>
> . . . a consideration of any complaint which Bray might see fit to allege, will only delay the resolution of this immediate problem. A proper investigation of any complaint *on other subject matters* [emphasis added] would require an additional period of time which works to Chevron's obvious detriment.

Thus, it is quite beyond dispute that petitioners "claims on the merits" were not presented by way of a formal complaint to the FEA, because both Chevron and Bray Oil were waiting for *a final decision,* by the FEA on its own notice of probable violation of federal regulations. Both Chevron and Bray Oil believed the filing of a formal complaint would delay that decision. The testimony of FEA's William Costello firmly establishes this fact. The NOPV was not "technically" rescinded because Bray Oil did not file formal complaint.

Both Dana Bray and his attorney repeatedly testified that there was no reasonable hope of getting the FEA to reconsider its action by the use of a "formal complaint". The submission of a formal damage claim to the FEA was not considered by Bray Oil to be of any practical utility. In fact, this very point was discussed by Attorney O'Brien and Dana Bray just prior to execution of the release. Attorney O'Brien, a former Vermont Superior Court Judge, testified that since he believed the FEA had determined Chevron had not violated federal regulations, he could not provide Dana Bray with a sufficient basis on which to forecast a successful

outcome of either litigation or the possibility of initiating new administrative proceedings. (Appellate Record 377, 379). [5]

Chevron advanced the same contentions discussed above, to the TECA. The petitioners rebutted each and every point, with either evidence to the contrary or with undisputed evidence. Most importantly, the man most active in defrauding Bray Companies and violating federal regulations, Chevron's chief negotiator, Eric Pfefferkorn, did not take the stand at trial, and never once denied in his deposition testimony which was read to the jury, that he informed Dana Bray, by letter and telephone, that the FEA had made a final decision of its NOPV in Chevron's favor. Chevron's contention that Pfefferkorn's oral misrepresentation was "vigorously disputed at trial" underscores its disregard of the J.N.O.V. standard of appellate review. O.B. 5.

Petitioners believe that an unwarranted grant of J.N.O.V. is always of interest in this Court. However, the issues presented in this petition are capable of swift resolution without factual review of any kind. The decisive legal issue is whether a "duty to investigate" the truth of a material misrepresentation is an element of federal common law fraud. Cf. *Dice v. Akton, C&Y&R Co.*, 342 U.S. 359 (1952).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be GRANTED.

Respectfully submitted,

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[5] The alleged testimony of "Mr. Bray's banker" does not appear in the Record on Appeal. See O.B 7